VIEW

OF THE

STATE OF EUROPE

DURING

THE MIDDLE AGES.

IN THREE VOLUMES.

BY HENRY HALLAM

Ἐκ Χάεος δ' Ἔρεβός τε μέλαινά τε Νὺξ ἐγένοντο·
Νυκτὸς δ' αὖτ' Αἰθήρ τε καὶ Ἡμέρη ἐξεγένοντο.
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THE history of Spain during the middle ages ought to commence with the dynasty of the Visigoths; a nation among the first that assaulted and overthrew the Roman empire, and whose establishment preceded by nearly half a century the inva-

Kingdom of Visigoths in Spain.

tion of Clovis. Vanquished by that conqueror in the battle of Poitiers, the Gothic monarchs lost their extensive dominions in Gaul, and transferred their residence from Toulouse to Toledo. But I hold the annals of barbarians so unworthy of remembrance, that I will not detain the reader by naming one sovereign of that obscure race. The Merovingian kings of France were perhaps as deeply stained by atrocious crimes, but their history, slightly as I have noticed it, is the necessary foundation of that of Charlemagne, and illustrates the feudal system and constitutional antiquities of France. If those of Castile had been equally interesting to the historical student, I should have taken the same pains to trace their original in the Gothic monarchy. For that is at least as much the primary source of the old Castilian constitution, as the Anglo-Saxon polity of our own. It may however suffice to mention, that it differed in several respects from that of the Franks during the same period. The crown was less hereditary, or at least the regular succession was more frequently disturbed. The prelates had a still more commanding influence in temporal government. The distinction of Romans and barbarians was less marked, the laws more uniform, and approaching nearly to the imperial code. The power of the sovereign was perhaps more limited by an aristocratical council than in France, but it never yielded to the dangerous influence of mayors of the palace. Civil wars and disputed successions were very frequent, but the integrity of the kingdom was not violated by the custom of partition.

Spain, after remaining for nearly three centuries in the possession of the Visigoths, fell under the yoke of the Saracens in 712. The fervid and irresistible enthusiasm which distinguished the youthful period of Mohammedism, might sufficiently account for this conquest: even if we could not assign additional causes, the factions which divided the Goths, the resentment of disappointed pretenders to the throne, the provocations of Count Julian, and the temerity that risked the fate of an empire on the chances of a single battle. It is more surprizing, that a remnant of this ancient monarchy should not only have preserved its national liberty and name in the northern mountains, but waged for some centuries a successful, and generally an offensive warfare against the conquerors, till the balance was completely turned in its favour, and the Moors were compelled to maintain almost as obstinate and protracted a contest for a small portion of the peninsula. But the Arabian monarchs of Cordova found in their success and imagined security a pretext for indolence; even in the cultivation of science, and contemplation of the magnificent architecture of their mosques and palaces, they forgot their poor, but daring enemies in the Asturias; while, according to the nature of despotism, the fruits of wisdom or bravery in one generation were lost in the follies and effeminacy of the next. Their kingdom was dismembered by successful rebels, who formed the states of Toledo, Huesca, Saragosa, and others less eminent; and these, in their

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own mutual contests, not only relaxed their natural enmity towards the Christian princes, but sometimes sought their alliance.*

Kingdom of Leon.

The last attack, which seemed to endanger the reviving monarchy of Spain, was that of Almanzor, the illustrious vizir of Haccham II. towards the end of the tenth century, wherein the city of Leon, and even the shrine of Compostella, were burned to the ground.† For some ages before this transient reflux, gradual encroachments had been made upon the Saracens, and the kingdom, originally styled of Oviedo, the seat of which was removed to Leon in 914, had extended its boundary to the Duero, and even to the mountainous chain of the Guadarrama. The province of old Castile, thus denominated, as is generally supposed, from the castles erected, while it remained a march or frontier against the Moors, was governed by hereditary counts, elected originally by the provincial aristocracy, and virtually independent, it seems probable, of the kings of Leon, though commonly serving them in war, as brethren of the same faith and nation.‡

* Cardonne, Histoire de l'Afrique et de l'Espagne.

† According to Roderic of Toledo, one of the earliest Spanish historians, though not older than the beginning of the thirteenth century, the nobles of Castile, in the reign of Ferdinand, about the year 924, sibi et posteris providerunt, et duos milites non de potentioribus, sed de prudentioribus elegerunt, quod et judices statuerunt, ut dissensiones patriæ et querelantium causæ suo judicio sopirentur. Lib. 4. Several other passages in the same writer prove that the counts of Castile were nearly independent of Leon, at least from the time of Ferdinand Gonsalvo about the middle of the tenth century. Ex quo iste suscepit suæ patriæ comitatum, cessaverunt reges Asturiarum insolescere in Castellam, et a flumine Pisorica nihil amplius vindi-

Kingdoms of Navarre and Aragon.

While the kings of Leon were thus occupied in recovering the western provinces, another race of Christian princes grew up silently under the shadow of the Pyrenean mountains. Nothing can be more obscure than the beginnings of those little states, which were formed in Navarre and the country of Sobrarbe. They might perhaps be almost contemporaneous with the Moorish conquests. On both sides of the Pyrenees dwelt an aboriginal people; the last to undergo the yoke, and who had never acquired the language, of Rome. We know little of these intrepid mountaineers in the dark period which elapsed under the Gothic and Frank dynasties, till we find them cutting off the rear-guard of Charlemagne in Roncesvalles, and maintaining at least their independence, though seldom, like the kings of Asturias, waging offensive war against the Saracens. The town of Jaca, situated among long narrow vallies that intersect the southern ridges of the Pyrenees, was the capital of a little free state, which afterwards expanded into the monarchy of Aragon.* A territory rather more extensive be-

carunt l. v. c. 2. Marina, in his Ensayo Historico-Critico, is disposed to controvert this fact.

* The Fueros, or written laws of Jaca, were perhaps more ancient than any local customary in Europe. Alfonso III. confirms them by name of the ancient usages of Jaca. They prescribe the descent of lands and moveables, as well as the election of municipal magistrates. The following law, which enjoins the rising in arms on a sudden emergency, illustrates, with a sort of romantic wildness, the manners of a pastoral, but warlike people, and reminds us of a well known passage in the Lady of the Lake. De appellitis ita statuimus. Cum homines de villis, vel qui sunt in montanis cum suis ganatis [gregibus], audierint appellitum, omnes capiant arma, et dimissis ganatis, et omnibus aliis suis faziendis [ne-

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longed to Navarre, the kings of which fixed their seat at Pampelona. Biscay seems to have been divided between this kingdom and that of Leon. The connexion of Aragon or Soprarbe and Navarre was very intimate, and they were often united under a single chief.

Kingdom of Castile.

At the beginning of the eleventh century, Sancho the Great, king of Navarre and Aragon, was enabled to render his second son Ferdinand, count, or, as he assumed the title, king of Castile. This effectually dismembered that province from the kingdom of Leon; but their union soon became more complete than ever, though with a reversed supremacy. Bermudo III. king of Leon, fell in a battle with the new king of Castile who had married his sister; and Ferdinand, in her right, or in that of conquest, became master of the united monarchy. This cessation of hostilities between the Christian states enabled them to direct a more unremitting energy against their ancient enemies, who were now sensibly weakened by the various causes of decline to which I have already alluded. During the eleventh century, the Spaniards were almost always superior in the field; the towns,

otum sequantur appellitum. Et si illi qui fuerint magis remoti, inveniunt in villa magis proxima appellito, [deest aliquid] omnes qui nondum fuerint egressi suam villam illam, quæ tardius secuta est appellitum, pecent [solvant] unam baccam [vaccam], et unusquisque homo ex illis qui tardius secutus est appellitum, et quem magis remoti præcesserint, pecet tres solidos, quomodo nobis videbitur, partiendos. Tamen in Jaca et in aliis villis, sint aliqui nominati et certi, quos elegerint consules, qui remaneant ad villas custodiendas et defendendas. Blanca Commentaria in Schotti Hispania Illustrata, p. 595.

which they began by pillaging, they gradually possessed; their valour was heightened by the customs of chivalry, and inspired by the example of the Cid; and before the end of this age, Alonso VI. recovered the ancient metropolis of the monarchy, the city of Toledo. This was the severest blow which the Moors had endured, and an unequivocal symptom of that change in their relative strength, which, from being so gradual, was the more irretrievable. Calamities scarcely inferior fell upon them in a different quarter. The kings of Aragon a title belonging originally to a little district upon the river of that name had been cooped up almost in the mountains by the small Moorish states north of the Ebro, especially that of Huesca. About the middle of the eleventh century, they began to attack their neighbours with success, the Moors lost one town after another, till in 1118, exposed and weakened by the reduction of all these places, the city of Saragosa, in which a line of Mohammedan princes had flourished for several ages, became the prize of Alfonso I. and the capital of his kingdom. The southern parts of what is now the province of Aragon were successively reduced during the twelfth century; while all new Castile and Estremadura became annexed in the same gradual manner to the dominion of the descendants of Alfonso VI.

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Capture of Toledo.

and Saragosa

Although the feudal system cannot be said to have obtained in the kingdoms of Leon and Castile, their peculiar situation gave the aristo-

Mode of settling the new conquests

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cracy a great deal of the same power and independence which resulted in France and Germany from that institution. The territory successively recovered from the Moors, like waste lands reclaimed, could have no proprietor but the conquerors; and the prospect of such acquisitions was a constant incitement to the nobility of Spain, especially to those who had settled themselves on the Castilian frontier. In their new conquests, they built towns and invited Christian settlers, the Saracen inhabitants being commonly expelled, or voluntarily retreating to the safer provinces of the south. Thus Burgos was settled by a count of Castile about 880, another fixed his seat at Osma, a third at Sepulveda, a fourth at Salamanca. These cities were not free from incessant peril of a sudden attack till the union of the two kingdoms under Ferdinand I. and consequently the necessity of keeping in exercise a numerous and armed population gave a character of personal freedom and privilege to the inferior classes, which they hardly possessed at so early a period in any other monarchy. Villenage seems never to have been established in the Hispano-Gothic kingdoms Leon and Castile, though I confess it was far from being unknown in that of Aragon, which had formed its institutions on a feudal pattern. Since nothing makes us forget the arbitrary distinctions of rank so much as participation in any common calamity, every man who had escaped the great shipwreck of liberty and religion in the mountains of Asturias was invested with a personal dignity,

which gave him value in his own eyes and those of his country. It is probably this sentiment, transmitted to posterity, and gradually fixing the national character, that has produced the elevation of manner, remarked by travellers in the Castilian peasant. But while these acquisitions of the nobility promoted the grand object of winning back the peninsula from its invaders, they by no means invigorated the government, or tended to domestic tranquillity.

Chartered towns or communities.

A more interesting method of securing the public defence was by the institution of chartered towns or communities. These were established at an earlier period than in France or England, and were in some degree of a peculiar description. Instead of purchasing their immunities, and almost their personal freedom, at the hands of a master, the burgesses of Castilian towns were invested with civil rights and extensive property on the more liberal condition of protecting their country. The earliest instance of the erection of a community is in 1020, when Alfonso V. in the cortes at Leon established the privileges of that city, with a regular code of laws, by which its magistrates should be governed. The citizens of Carrion, Llanes, and other towns were incorporated by the same prince. Sancho the Great gave a similar constitution to Naxara. Sepulveda had its code of laws in 1076 from Alfonso VI.: in the same reign Logrono and Sahagun acquired their privileges, and Salamanca not long afterwards. The fuero, or original charter of a Spanish com-

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munity, was properly a compact, by which the king or lord granted a town and adjacent district to the burgesses, with various privileges, and especially that of chusing magistrates and a common *council, who were bound to conform themselves to the laws prescribed by the founder.* These laws, civil as well as criminal, though essentially derived from the ancient code of the Visigoths, which continued to be the common law of Castile till the fourteenth or fifteenth century, varied from each other in particular usages, which had probably grown up and been established in these districts before their legal confirmation. The territory held by chartered towns was frequently very extensive, far beyond any comparison with corporations in our own country or in France, including the estates of private land-holders, subject to the jurisdiction and controul of the municipality, as well as its inalienable demesnes, allotted to the maintenance of the magistrates and other public expenses. In every town the king appointed a governor to receive the usual tributes, and watch over the police and the fortified places within the district, but the administration of justice was exclusively reserved to the inhabitants and their elected judges. Even the executive power of the royal officer was regarded with jealousy; he was forbidden to use violence towards any one without legal process; and, by the fuero of Logrono, if he attempted to enter forcibly into a private house, he might be killed with impunity. These democratical customs were altered in the

fourteenth century by Alfonso XI., who vested the municipal administration in a small number of jurats, or regidors. A pretext for this was found in some disorders to which popular elections had led; but the real motive, of course, must have been to secure a greater influence for the crown, as in similar innovations of some English kings.

In recompense for such liberal concessions, the incorporated towns were bound to certain money payments, and to military service. This was absolutely due from every inhabitant, without dispensation or substitution, unless in case of infirmity. The royal governor and the magistrates, as in the simple times of primitive Rome, raised and commanded the militia, who, in a service always short, and for the most part necessary, preserved that delightful consciousness of freedom, under the standard of their fellow citizens and chosen leaders, which no mere soldier can enjoy. Every man of a certain property was bound to serve on horseback, and was exempted in return from the payment of taxes. This produced a distinction between the *caballeros*, or noble class, and the *pecheros*, or payers of tribute. But the distinction appears to have been founded only upon wealth, as in the Roman equites, and not upon hereditary rank, though it most likely prepared the way for the latter. The horses of these caballeros could not be seized for debt; in some cases, they were exclusively eligible to magistracy; and their honour was protected by laws which rendered

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it highly penal to insult or molest them. But the civil rights of rich and poor in courts of justice were as equal as in England.*

Military orders

The progress of the Christian arms in Spain may in part be ascribed to another remarkable feature in the constitution of that country, the military orders. These had already been tried with signal effect in Palestine, and the similar circumstances of Spain easily led to an adoption of the same policy. In a very few years after the first institution of the Knights Templars, they were endowed with great estates, or rather districts, won from the Moors, on condition of defending their own, and the national territory. These lay chiefly in the parts of Aragon beyond the Ebro, the conquest of which was then recent and insecure.† So extraordinary was the respect for this order, and that of St. John, and so powerful the conviction that the hope of Christendom rested upon their valour, that Alfonso the First, king of Aragon, dying childless, bequeathed to them his whole kingdom, an example of liberality, says Mariana, to surprize future times, and displease his own.‡ The states of Aragon

* I am indebted for this account of municipal towns in Castile to a book published at Madrid in 1808, immediately after the revolution, by the Doctor Marina, a canon of the church of St Isidor, intitled, Ensayo Historico-Critico sobre la antigua legislacion y principales cuerpos legales de los reynos de Leon y Castilla, especialmente sobre el codigo de D. Alonso el Sabio, conocido con el nombre de las Siete Partidas. This work is perhaps not easily to be procured in England but an article in the Edinburgh Review, No XLIII., will convey a sufficient notion of its contents.

† Mariana, Hist Hispan l. x c 10.

‡ l x c 1'.

annulled, as may be supposed, this strange testament; but the successor of Alfonso was obliged to pacify the ambitious knights by immense concessions of money and territory; stipulating even not to make peace with the Moors against their will.* In imitation of these great military orders, common to all Christendom, there arose three Spanish institutions of a similar kind, the orders of Calatrava, Santiago, and Alcantara. The first of these was established in 1158, the second and most famous had its charter from the pope in 1175, though it seems to have existed previously, the third branched off from that of Calatrava at a subsequent time.† These were military colleges, having their walled towns in different parts of Castile, and governed by an elective grand master, whose influence in the state was at least equal to that of any of the nobility. In the civil dissensions of the fourteenth and fifteenth centuries, the chiefs of these incorporated knights were often very prominent.

The kingdoms of Leon and Castile were unwisely divided anew by Alfonso VI. between his sons Sancho and Ferdinand, and this produced not only a separation, but a revival of the ancient jealousy with frequent wars for near a century. At length, in 1238, Ferdinand III. king of Castile, re-united for ever the two branches of the Gothic monarchy. He employed their joint strength against the Moors, whose dominion, though it still

Final union of Leon and Castile

* Ixc 18 † Ixc 6 13 Ixc 1

CHAP. IV. embraced the finest provinces of the peninsula, was sinking by internal weakness, and had never recovered a tremendous defeat at Banos di Toloso, a few miles from Baylen, in 1210.* Ferdinand, bursting into Andalusia, took its great capital, the city of Cordova, not less ennobled by the cultivation of Arabian science, and by the names of Avicenna and Averroes, than by the splendid works of a rich and munificent dynasty.† In a few years more, Seville was added to his conquests, and the Moors lost their favourite regions on the banks of the Guadalquivir. James I. of Aragon, the victories of whose long reign gave him the surname of Conqueror, reduced the city and kingdom of Valencia, the Balearic isles, and the kingdom of Murcia, but the last was annexed, according to compact, to the crown of Castile.

PAIN.

Conquest of Andalusia, 1236

and Valencia.

Expulsion

It could hardly have been expected about the

* A letter of Alfonso IX. who gained this victory, to Pope Innocent III., puts the loss of the Moors at 180,000 men. The Arabian historians, though without specifying numbers, seem to confirm this immense slaughter, which nevertheless it is difficult to conceive before the invention of gunpowder, or indeed since. Cardonne, t. ii. p. 327.

† If we can rely on a Moorish author, quoted by Cardonne, (t. ii. p. 317.) the city of Cordova contained, I know not exactly in what century, 200,000 houses, 600 mosques, and 900 public baths. There were 12,000 towns and villages on the banks of the Guadalquivir. The mines of gold and silver were very productive. And the revenues of the khalifs of Cordova are said to have amounted to 140,000,000 of French money, besides large contributions that, according to the practice of oriental governments, were paid in the fruits of the earth. Other proofs of the extraordinary opulence and splendour of this monarchy are dispersed in Cardonne's work, from which they have been chiefly borrowed by later writers. The splendid engravings in Murphy's Moorish antiquities of Spain illustrate this subject.

middle of the thirteenth century, when the splendid conquests of Ferdinand and James had planted the Christian banner on the three principal Moorish cities, that two hundred and fifty years were yet to elapse before the rescue of Spain from their yoke should be completed. Ambition, religious zeal, national enmity, could not be supposed to pause in a career, which now seemed to be obstructed by such moderate difficulties: but we find, on the contrary, the exertions of the Spaniards begin from this time to relax, and their acquisitions of territory to become more slow. One of the causes, undoubtedly, that produced this unexpected protraction of the contest was the superior means of resistance which the Moors found in retreating. Their population, spread originally over the whole of Spain, was now condensed, and, if I may so say, become no further compressible, in a single province. It had been mingled, in the northern and central parts, with the Mozarabic Christians, their subjects and tributaries, not perhaps treated with much injustice, yet naturally and irremediably their enemies. Toledo and Saragosa, when they fell under a Christian sovereign, were full of these inferior Christians, whose long intercourse with their masters has infused the tones and dialect of Arabia into the language of Castile.* But in the twelfth century, the Moors, exasperated by defeat, and jealous of secret disaffection, began to persecute

CHAP. IV. SPAIN. Causes of the Moors long delay.

* Mariana, l. xi. c. 1. Gibbon, c. 51.

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their Christian subjects, till they renounced or fled for their religion; so that, in the southern provinces, scarcely any professors of Christianity were left at the time of Ferdinand's invasion. An equally severe policy was adopted on the other side. The Moors had been permitted to dwell in Saragosa, as the Christians had dwelt before, subjects, not slaves, but on the capture of Seville, they were entirely expelled, and new settlers invited from every part of Spain. The strong fortified towns of Andalusia, such as Gibraltar, Algeziras, Tariffa, maintained also a more formidable resistance than had been experienced in Castile, they cost tedious sieges, were sometimes recovered by the enemy, and were always liable to attacks. But the great protection of the Spanish Mohammedans was found in the alliance and ready aid of their kindred beyond the Straits. Accustomed to hear of the African Moors only as pirates, we cannot easily conceive the powerful dynasties, the warlike chiefs, the vast armies, which for seven or eight centuries illustrate the annals of that people. Their assistance was always afforded to the true believers in Spain, though their ambition was generally dreaded by those who stood in need of their valour.*

Probably, however, the kings of Granada were most indebted to the indolence which gradually became characteristic of their enemies. By the cession of Murcia to Castile, the kingdom of Ara-

* Cardonne, t. ii. and iii. passim.

gon shut itself out from the possibility of extending those conquests which had ennobled her earlier sovereigns, and their successors, not less ambitious and enterprizing, diverted their attention towards objects beyond the peninsula. The Castilian, patient and undesponding in bad success, loses his energy as the pressure becomes less heavy, and puts no ordinary evil in comparison with the exertions by which it must be removed. The greater part of his country freed by his arms, he was content to leave the enemy in a single province, rather than undergo the labour of making his triumph complete.

Alfonso X. 1252

If a similar spirit of insubordination had not been found compatible in earlier ages with the aggrandizement of the Castilian monarchy, we might ascribe its want of splendid successes against the Moors to the continued rebellions which disturbed that government for more than a century after the death of Ferdinand III. His son, Alfonso X., might justly acquire the surname of Wise for his general proficiency in learning, and especially in astronomical science: if these attainments deserved praise in a king, who was incapable of preserving his subjects in their duty. As a legislator, Alfonso, by his code of the Siete Partidas, sacrificed the ecclesiastical rights of his crown to the usurpation of Rome,* and his philosophy sunk below the level of ordinary prudence, when he permitted the phantom of an imperial crown in Germany to

* Marina, Ensayo Histórico-Crítico, p. 272. &c.

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seduce his hopes for almost twenty years. For the sake of such an illusion he would even have withdrawn himself from Castile, if the states had not remonstrated against an expedition, that would probably have cost him the kingdom. In the latter years of his turbulent reign, Alfonso had to contend against his son. The right of representation was hitherto unknown in Castile, which had borrowed little from the customs of feudal nations. By the received law of succession, the nearer was always preferred to the more remote, the son to the grandson. Alfonso X. had established the different maxim of representation by his code of the Siete Partidas, the authority of which, however, was not universally acknowledged. The question soon came to an issue, on the death of his elder son Ferdinand leaving two male children. Sancho their uncle asserted his claim, founded upon the ancient Castilian right of succession, and this, chiefly no doubt through fear of arms, though it did not want plausible arguments, was ratified by an assembly of the cortes and secured, notwithstanding the king's reluctance, by the courage of Sancho. But the descendants of Ferdinand, generally called the Infants of La Cerda, by the protection of France, to whose royal family they were closely allied, and of Aragon, always prompt to interfere in the disputes of a rival people, continued to assert their pretensions for more than half a century, and, though they were not very successful, did not fail to aggravate the troubles of their country.

The annals of Sancho IV. and his two immediate

successors, Ferdinand IV and Alfonso XI., present a series of unhappy and dishonourable civil dissensions with too much rapidity to be remembered or even understood. Although the Castilian nobility had no pretence to the original independence of the French peers, or to the liberties of feudal tenure, they assumed the same privilege of rebelling upon any provocation from their sovereign. When such occurred, they seem to have been permitted, by legal custom, to renounce their allegiance by a solemn instrument, which exempted them from the penalties of treason.* A very few families composed an oligarchy, the worst and most ruinous condition of political society, alternately the favourites and ministers of the prince, or in arms against him. If unable to protect themselves in their walled towns, and by the aid of their faction, these Christian patriots retired to Aragon or Granada, and excited an hostile power against their country and perhaps their religion. Nothing is more common in the Castilian history, than instances of such defection. Mariana remarks coolly of the family of Castro, that they were much in the habit of revolting to the Moors.† This house and that of Lara were at one time the great rivals for power, but from the time of Alfonso X. the former seems to have declined, and the sole family that came in competition with the Laras during

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* Mariana, l. xiii. c. 11.

† Alvarus Castrius patria ab quanto antea, uti mori erat, re omnerit. Castriy ... per hac tempora ad M... visse est, l. xiii. c. 1... chapters 17 and 1...

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the tempestuous period that followed, was that of Haro, which possessed the lordship of Biscay by an hereditary title. The evils of a weak government were aggravated by the unfortunate circumstances in which Ferdinand IV. and Alfonso XI. ascended the throne; both minors, with a disputed regency, and the interval too short to give ambitious spirits leisure to subside. There is indeed some apology for the conduct of the Laras and Haros in the character of their sovereigns, who had but one favourite method of avenging a dissembled injury, or anticipating a suspected treason. Sancho IV. assassinates Don Lope Haro in his palace at Valladolid. Alfonso XI. invites to court the infant Don Juan, his first cousin, and commits a similar violence. Such crimes may be found in the history of other countries, but they were no where so usual as in Spain, which was far behind France, England, and even Germany, in civilization.

Peter the Cruel 1350

But whatever violence and arbitrary spirit might be imputed to Sancho and Alfonso, was forgotten in the unexampled tyranny of Peter the Cruel. A suspicion is frequently intimated by Mariana, which seems, in more modern times, to have gained credit, that party malevolence has at least grossly exaggerated the enormities of this prince.* It is

There is in general room enough for scepticism as to the characters of men, who are only known to us through their enemies History is full of calumnies, and of calumnies that can never be effaced But I really see no ground for thinking charitably of Peter the Cruel Froissart, part i. c 230 and Matteo Villani, (in Script Rerum Italic t xiv p 43.) the latter of whom died before the rebellion of Henry of Trastamare, speak of him much in the same terms as

difficult, however, to believe that a number of atrocious acts, unconnected with each other, and generally notorious enough in their circumstances, have been ascribed to any innocent man. The history of his reign, chiefly derived, it is admitted, from the pen of an inveterate enemy, Lope de Ayala, charges him with the murder of his wife, Blanche of Bourbon, most of his brothers and sisters, with Eleanor Gusman their mother, many Castilian nobles, and multitudes of the commonalty; besides continual outrages of licentiousness, and especially a pretended marriage with a noble lady of the Castrian family. At length a rebellion was headed by his illegitimate brother Henry, count of Trastamare, with the assistance of Aragon and Portugal. This, however, would probably have failed of dethroning Peter, a resolute prince, and certainly not destitute of many faithful supporters, if Henry had not invoked the more powerful succour of Bertrand du Guesclin, and the companies of adventure, who, after the pacification between France and England, had lost the occupation of war, and retained only that of plunder. With mercenaries so disciplined it was in vain for

the Spanish historians. And why should Ayala be doubted, when he gives a long list of murders committed in the face of day, within the recollection of many persons living when he wrote? There may be a question whether Richard III smothered his nephews in the Tower, but nobody can dispute that Henry VIII cut off Anne Bullen's head.

The passage from Matteo Villani above-mentioned is as follows: — Comincio aspramente a sospettare e dubitare, perche temendo de' suoi baroni, trovo modo di far infamare l'uno l'altro, e prendendo cagione, gli comincio ad uccidere con le sue mani. E in breve tempo ne fece morire 25, e tre suoi fratelli fece morire, &c.

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Peter to contend; but, abandoning Spain for a moment, he had recourse to a more powerful weapon from the same armoury. Edward the Black Prince, then resident at Bourdeaux, was induced by the promise of Biscay, to enter Spain as the ally of Castile; and at the great battle of Navarette, he continued lord of the ascendant over those who had so often already been foiled by his prowess. Du Guesclin was made prisoner, Henry fled to Aragon, and Peter remounted the throne. But a second revolution was at hand: the Black Prince, whom he had ungratefully offended, withdrew into Guienne, and he lost his kingdom and life in a second short contest with his brother.

1367

House of Trastamara
Henry II 1368
John I 1379
Henry III 1390

A more fortunate period began with the accession of Henry. His own reign was hardly disturbed by any rebellion, and though his successors, John I. and Henry III., were not altogether so unmolested, especially the latter, who ascended the throne in his minority, yet the troubles of their time were slight in comparison with those formerly excited by the houses of Lara and Haro, both of which were now happily extinct. Though Henry II.'s illegitimacy left him no title but popular choice, his queen was sole representative of the Cerdas, the offspring, as has been mentioned above, of Sancho IV.'s elder brother, and, by the extinction of the younger branch, unquestioned heiress of the royal line. Some years afterwards, by the marriage of Henry III. with Catherine, daughter of John of Gaunt and of Constance, an illegitimate child of Peter the Cruel, her pretensions, such as they were, became merged in the crown.

No kingdom could be worse prepared to meet the disorders of a minority than Castile, and in none did the circumstance so frequently recur. John II. was but fourteen months old at his accession, and but for the disinterestedness of his uncle Ferdinand, the nobility would have been inclined to avert the danger by placing that prince upon the throne. In this instance, however, Castile suffered less from faction, during the infancy of her sovereign, than in his maturity. The queen dowager, at first jointly with Ferdinand, and solely after his accession to the crown of Aragon, administered the government with credit. Fifty years had elapsed at her death in 1418, since the elevation of the house of Trastamare, who had entitled themselves to public affection by conforming themselves more strictly than their predecessors to the constitutional laws of Castile, which were never so well established as during this period. In external affairs their reigns were not what is considered as glorious. They were generally at peace with Aragon and Granada, but one memorable defeat by the Portuguese at Aljubarrota disgraces the annals of John I., whose cause was as unjust as his arms were unsuccessful. This comparatively golden period ceases at the majority of John II. His reign was filled up by a series of conspiracies and civil wars, headed by his cousins John and Henry, the infants of Aragon, who enjoyed very extensive territories in Castile, by the testament of their father Ferdinand. Their brother the king of Aragon frequently lent the assistance of his arms. John

CHAP. IV. SPAIN. John II

1406

1385

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himself, the elder of these two princes, by marriage with the heiress of the kingdom of Navarre, stood in a double relation to Castile, as a neighbouring sovereign, and as a member of the native oligarchy. These conspiracies were all ostensibly directed against the favourite of John II., Alvaro de Luna, who retained for five-and-thirty years an absolute controul over his feeble master. The adverse faction naturally ascribed to this powerful minister every criminal intention and all public mischiefs. He was certainly not more scrupulous than the generality of statesmen, and appears to have been rapacious in accumulating wealth. But there was an energy and courage about Alvaro de Luna, which distinguishes him from the cowardly sycophants who usually rise by the favour of weak princes, and Castile probably would not have been happier under the administration of his enemies. His fate is among the memorable lessons of history. After a life of troubles endured for the sake of this favourite, sometimes a fugitive, sometimes a prisoner, his son heading rebellions against him, John II. suddenly yielded to an intrigue of the palace, and adopted sentiments of dislike towards the man he had so long beloved. No substantial charge appears to have been brought against Alvaro de Luna, except that general malversation which it was too late for the king to object to him. The real cause of John's change of affection was, most probably, the insupportable restraint which the weak are apt to find in that spell of a commanding understanding which they dare not break: the torment

Power and fall of Alvaro de Luna

of living subject to the ascendant of an inferior, which has produced so many examples of fickleness in sovereigns. That of John II. is not the least conspicuous. Alvaro de Luna was brought to a summary trial and beheaded; his estates were confiscated. He met his death with the intrepidity of Strafford, to whom he seems to have borne some resemblance in character.

John II. did not long survive his minister, dying in 1454, after a reign that may be considered as inglorious, compared with any except that of his successor. If the father was not respected, the son fell completely into contempt. He had been governed by Pacheco marquis of Villena, as implicitly as John by Alvaro de Luna. This influence lasted for some time afterwards. But the king meaning to transfer his confidence to the queen Joanna of Portugal, and to one Bertrand de Cueva, upon whom common fame had fixed as her paramour, a powerful confederacy of disaffected nobles was formed against the royal authority. In what degree Henry IV.'s government had been improvident or oppressive towards the people, it is hard to determine. The chiefs of that rebellion, Carillo archbishop of Toledo, the admiral of Castile, a veteran leader of faction, and the marquis of Villena, so lately the king's favourite, were undoubtedly actuated only by selfish ambition and revenge. They deposed Henry in an assembly of their faction at Avila with a sort of theatrical pageantry which has often been described. But modern historians, struck by the appearance of

1465

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judicial solemnity in this proceeding, are sometimes apt to speak of it as a national act; while, on the contrary, it seems to have been reprobated by the majority of the Castilians, as an audacious outrage upon a sovereign, who, with many defects, had not been guilty of any excessive tyranny. The confederates set up Alfonso the king's brother, and a civil war of some duration ensued, in which they had the support of Aragon. The queen of Castile had at this time borne a daughter, whom the enemies of Henry IV., and indeed no small part of his adherents, were determined to treat as spurious. Accordingly, after the death of Alfonso, his sister Isabel was considered as heiress of the kingdom. She might have aspired, with the assistance of the confederates, to its immediate possession, but avoiding the odium of a contest with her brother, Isabel agreed to a treaty, by which the succession was absolutely
1469 settled upon her. This arrangement was not long afterwards followed by the union of that princess with Ferdinand, son of the king of Aragon. This marriage was by no means acceptable to a part of the Castilian oligarchy, who had preferred a connexion with Portugal. And as Henry had never lost sight of the interests of one whom he considered, or pretended to consider, as his daughter, he took the first opportunity of revoking his forced disposition of the crown, and restoring the direct line of succession in favour of the princess Joanna. Upon his death, in 1474, the right was to be decided by arms. Joanna had on her side

the common presumptions of law, the testamentary disposition of the late king, the support of Alfonso king of Portugal, to whom she was betrothed, and of several considerable leaders among the nobility, as the young marquis of Villena, the family of Mendoza, and the archbishop of Toledo, who, charging Ferdinand with ingratitude, had quitted a party which he had above all men contributed to strengthen. For Isabella were the general belief of Joanna's illegitimacy, the assistance of Aragon, the adherence of a majority both among the nobles and people, and, more than all, the reputation of ability which both she and her husband had deservedly acquired. The scale was however pretty equally balanced, till the king of Portugal having been defeated at Toro, in 1476, Joanna's party discovered their inability to prosecute the war by themselves, and successively made their submission to Ferdinand and Isabella.

Constitution of Castile. Succession of the crown.

The Castilians always considered themselves as subject to a legal and limited monarchy. For several ages, the crown was elective, as in most nations of German origin, within the limits of one royal family.* In general, of course, the public

* Defuncto in pace principe, primates totius regni una cum sacerdotibus successorem regni concilio communi constituant. Concil. Toletan. IV. c. 75. apud Marina, Teoria de las Cortes, t. ii. p. 2. This important work, by the author of the Ensayo Historico-Critico, quoted above, contains an ample digest of the parliamentary law of Castile, drawn from original and, in a great degree, unpublished records. I have been favoured with the use of a copy, from which I am the more disposed to make extracts, as the book is likely, through its liberal principles, to become almost as scarce in Spain as in England. Marina's former work (the Ensayo Hist. Crit.) furnishes a series of testimonies, (c. 66.) to the elective character of the monarchy from Pelayo downwards to the twelfth century.

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choice fell upon the nearest heir; and it became a prevailing usage to elect a son during the lifetime of his father; till, about the eleventh century, a right of hereditary succession was clearly established. But the form of recognizing the heir apparent's title in an assembly of the cortes, has subsisted until our own time.

National councils.

In the original Gothic monarchy of Spain, civil as well as ecclesiastical affairs were decided in national councils, the acts of many of which are still extant, and have been published in ecclesiastical collections. To these assemblies the dukes and other provincial governors, and in general the principal individuals of the realm, were summoned along with spiritual persons. This double aristocracy of church and state continued to form the great council of advice and consent in the first ages of the new kingdoms of Leon and Castile. The prelates and nobility, or rather some of the more distinguished nobility, appear to have concurred in all general measures of legislation, as we infer from the preamble of their statutes. It would be against analogy, as well as without evidence, to suppose that any representation of the commons had been formed in the earlier period of the monarchy. In the preamble of laws passed in 1020, and at several subsequent times during that and the ensuing century, we find only the bishops and magnats recited as present. According to the General Chronicle of Spain, deputies from the

Admission of deputies from towns.

[1] Teatro de las Cortes, t. ii. p. 7.

Castilian towns formed a part of cortes in 1169; a date not to be rejected as incompatible with their absence in 1178. However, in 1188, the first year of the reign of Alfonso IX., they are expressly mentioned; and from that æra were constant and necessary parts of those general assemblies.* It has been seen already, that the corporate towns, or districts of Castile had early acquired considerable importance, arising less from commercial wealth, to which the towns of other kingdoms were indebted for their liberties, than from their utility in keeping up a military organization among the people. To this they probably owe their early reception into the cortes, as integrant portions of the legislature, since we do not read that taxes were frequently demanded, till the extravagance of later kings, and then alienation of the domain compelled them to have recourse to the national representatives.

Every chief town of a concejo or corporation ought perhaps, by the constitution of Castile, to have received its regular writ for the election of deputies to cortes.† But there does not appear to have been, in the best times, any uniform practice in this respect. At the cortes of Burgos, in 1315, we find one hundred and ninety-two representatives

* Ensayo Hist Crit p 77. Teoria de las Cortes, t i p 66. Marina seems to have somewhat changed his opinion since the publication of the former work, where he inclines to assert, that the commons were from the earliest times admitted into the legislature In 1188, the first year of the reign of Alfonso IX, we find positive mention of la muchedumbre de las cibdades e embiados de cada cibdat

† Teoria de las Cortes, p 119

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from more than ninety towns; at those of Madrid in 1391, one hundred and twenty-six were sent from fifty towns; and the latter list contains names of several places which do not appear in the former.* No deputies were present from the kingdom of Leon in the cortes of Alcala in 1348, where, among many important enactments, the code of the Siete Partidas first obtained a legislative recognition.† We find, in short, a good deal more irregularity than during the same period in England, where the number of electing boroughs varied pretty considerably at every parliament. Yet the cortes of Castile did not cease to be a numerous body and a fair representation of the people till the reign of John II. The first princes of the house of Trastamare had acted in all points with the advice of their cortes. But John II., and still more his son Henry IV., being conscious of their own unpopularity, did not venture to meet a full assembly of the nation. Their writs were directed only to certain towns, an abuse for which the looseness of preceding usage had given a pretence.‡ It must be owned that the people bore it in general very patiently. Many of the corporate towns, impoverished by civil warfare and other causes, were glad to save the cost of

* Loaisa de las Cortes, p. 148. Giddes gives a list of one hundred and twenty-seven deputies from forty-eight towns to the cortes at Madrid in 1390. Miscellaneous Tracts, vol. iii.

† Id. p. 154.

‡ Sepades, (says John II. in 1442,) que en el ayuntamiento que vo fice en la noble villa de Valladolid los procuradores de ciertas ciudades e villas de mis reynos que por mi mandado fueron llamados. This language is repeated as to subsequent meetings. p. 156.

defraying their deputies' expenses. Thus by the year 1480, only seventeen cities had retained privilege of representation. A vote was afterwards added for Granada, and three more in later times for Palencia, and the provinces of Estremadura and Galicia.* It might have been easy perhaps to redress this grievance, while the exclusion was yet fresh and recent. But the privileged towns, with a mean and preposterous selfishness, although their zeal for liberty was at its height, could not endure the only means of effectually securing it, by a restoration of elective franchises to their fellow citizens. The cortes of 1506 assert with one of those bold falsifications upon which a popular body sometimes ventures, that "it is established by some laws and by immemorial usage that eighteen cities of these kingdoms have the right of sending deputies to cortes, and no more," remonstrating against the attempts made by some other towns to obtain the same privilege, which they request may not be conceded. This remonstrance is repeated in 1512.†

From the reign of Alfonso XI. who restrained the government of corporations to an oligarchy of

* The cities which return their representation in cortes, if the present tense may still be used even for these ghosts of ancient liberty in Spain, are Burgos, Toledo, (there was a constant dispute for precedence between these two,) Leon, Granada, Cordova, Murcia, Jaen, Zamora, Toro, Soria, Valladolid, Salamanca, Segovia, Avila, Madrid, Guadalaxara and Cuenca. The representatives of these were supposed to vote not only for their immediate constituents, but for other adjacent towns. Thus Leon voted for Palencia and the kingdom of Galicia, before they obtained separate votes, Salamanca for most of Estremadura, Guadalaxara for Siguenza and four hundred other towns. Teoria de las Cortes, p. 160. 208.

† Idem, p. 161.

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magistrates, the right of electing members of corte was confined to the ruling body, the bailiffs or re gidores, whose number seldom exceeded twenty four, and whose succession was kept up by clos election among themselves.* The people there fore had no direct share in the choice of represen tatives. Experience proved, as several instance in these pages will shew, that even upon this na row basis, the deputies of Castile were not deficien in zeal for their country and its liberties. But must be confessed, that a small body of electo is always liable to corrupt influence and to intim dation. John II. and Henry IV. often invade the freedom of election; the latter even name some of the deputies.† Several energetic remo strances were made in cortes against this flagra grievance. Laws were enacted and other precau tions devised to secure the due return of deputie In the sixteenth century, the evil of course w aggravated. Charles and Philip corrupted th members by bribery.‡ Even in 1573 the cort are bold enough to complain, that creatures government were sent thither, "who are alwa held for suspected by the other deputies, an cause disagreement among them."§

Spiritual and temporal nobility in cortes.

There seems to be a considerable obscurity abo the constitution of the cortes, so far as relates the two higher estates, the spiritual and tempor nobility. It is admitted that down to the latt

* Teoria de las Cortes, p 86 197
† p. 199.
‡ Idem, p 213
§ p 202

part of the thirteenth century, and especially before the introduction of representatives from the commons, they were summoned in considerable numbers. But the writer, to whom I must almost exclusively refer for the constitutional history of Castile, contends, that from the reign of Sancho IV., they took much less share, and retained much less influence, in the deliberations of cortes.* There is a remarkable protest of the archbishop of Toledo, in 1295 against the acts done in cortes, because neither he nor the other prelates had been admitted to their discussions, nor given any consent to their resolutions, although such consent was falsely recited in the laws enacted therein.† This protestation is at least a testimony to the constitutional rights of the prelacy, which indeed all the early history of Castile, as well as the analogy of other governments, conspires to demonstrate. In the fourteenth and fifteenth centuries, however, they were more and more excluded. None of the prelates were summoned to the cortes of 1299 and 1301, none either of the prelates or nobles to those

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* Teoria de las Cortes, p. 67.

† Protestamos que desde aqui venimos non fuemos llamados a consejo, ni a los tratados sobre los fechos del reyno, ni sobre las otras cosas que hi fueren tractadas et fechas, et senaladamente sobre los fechos de los concejos de las hermandades, et de las peticiones que fueron fechas de su parte, et sobre los otorgamentos que les ficieron, et sobre los previlegios que por esta razon les fueron otorgados, mas ante fuemos ende apartados et estrannados et sacados expresamente nos et los otros prelados et ricos homes et los hijosdalgo, et non fue hi cosa fecha con nuestro consejo. Otrosi protestamos por razon de aquello que dice en los previlegios que les otorgaron, que fueren los prelados llamados, et que eran otorgados de consentimiento et de voluntad dellos, que non fuemos hi presentes ni llamados nin fue fecho con nuestra voluntad, nin consentiemos, nin consentimos en ellos, &c. p. 72.

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of 1370 and 1373, of 1480 and 1505. In all the latter cases, indeed, such members of both orders as happened to be present in the court attended the cortes; a fact, which seems to be established by the language of the statutes.* Other instances of a similar kind may be adduced. Nevertheless, the more usual expression in the preamble of laws, reciting those summoned to, and present at the cortes, though subject to considerable variation, seems to imply that all the three estates were, at least nominally and according to legitimate forms, constituent members of the national assembly. And a chronicle mentions, under the year 1406, the nobility and clergy as deliberating separately, and with some difference of judgment, from the deputies of the commons.† A theory, indeed,

* Teoria de las Cortes, p. 71.

† Ibid. p. 214. Marina is influenced by a prejudice in favour of the abortive Spanish constitution of 1812, which excluded the temporal and spiritual aristocracy from a place in the legislature, to imagine a similar form of government in ancient times. But his own work furnishes abundant reasons, if I am not mistaken, to modify this opinion very essentially. A few out of many instances may be adduced from the enacting words of statutes, which we consider in England as good evidences to establish a constitutional theory. Sepades que yo hobe mio acuerdo e mio consejo con mios hermanos e los arzobispos, e los obispos, e con los ricos homes de Castella, e de Leon, e con homes buenos de las villas de Castella, e de Leon, que fueron conmigo en Valladolit, sobre muchas cosas, &c. (Alfonso XI. in 1258.) Mandamos convocar e llamar por cartas del rey e nuestras a los infantes e perlados e ricos homes e infanzones e caballeros e homes buenos de las cibdades e de las villas de los reynos de Castilla et de Toledo e de Leon e de las Estremaduras, e de Gallicia e de las Asturias e del Andalusia. (Writ of summons to cortes of Burgos in 1315.) Con acuerdo de los perlados e de los ricos homes e procuradores de las cibdades è villas è logares de los nuestros reynos: (Ordinances of Toro in 1371.) Estando hi con él el infante Don Ferrando, &c. e otros perlados e condes e ricos homes e otros del consejo del señor rei, e otros caballeros e escuderos, e los procuradores de las cibdades e villas e logares de sus reynos: (Cortes of 1391.) Los tres estados que de

which should exclude the great territorial aristocracy from their place in cortes, would expose the dignity and legislative rights of that body to unfavourable inferences. But it is manifest, that the king exercised very freely a prerogative of calling or omitting persons of both the higher orders at his discretion. The bishops were numerous, and many of their sees not rich; while the same objections of inconvenience applied perhaps to the ricoshombres, but far more forcibly to the lower nobility, the hijosdalgo or caballeros. Castile never adopted the institution of deputies from each order, as in the States General of France and some other countries; much less that liberal system of landed representation, which forms one of the most admirable peculiarities in our own constitution. It will be seen hereafter, that spiritual and even temporal peers were summoned by our kings with much irregularity, and the disordered state of Castile through almost every reign was likely to prevent the establishment of any fixed usage in this and most other points.

ben venir a las cortes e ayuntamientos segunt se debe facer es de buena costumbre antigua (Cortes of 1393.) This last passage is apparently conclusive to prove, that three estates, the superior clergy, the nobility, and the commons, were essential members of the legislature in Castile, as they were in France and England, and one is astonished to read in Marina, that no faltaron a ninguna de las formalidades de derecho los monarcas que no tuvieron por oportuno llamar a cortes para semejantes actos ni al clero ni á la nobleza ni á las personas singulares de uno y otro estado. Jovellanos, that great citizen, appears to have had much wiser notions of the ancient government of his country, as well as of the sort of reformation which she wanted, as we may infer from passages in his Memoria a sus compatriotas, Coruña 1811, quoted by Marina for the purpose of censure.

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Right of taxation.

The primary and most essential characteristic of a limited monarchy is, that money can only be levied upon the people through the consent of their representatives. This principle was thoroughly established in Castile; and the statutes which enforce it, the remonstrances which protest against its violation, bear a lively analogy to corresponding circumstances in the history of our constitution. The lands of the nobility and clergy were, I believe, always exempted from direct taxation; an immunity which perhaps rendered the attendance of the members of those estates in the cortes less regular. The corporate districts, or concejos, which, as I have observed already, differed from the communities of France and England by possessing a large extent of territory, subordinate to the principal town, were bound by their charter to a stipulated annual payment, the price of their franchises, called moneda forera.* Beyond this sum nothing could be demanded without the consent of the cortes. Alfonso VIII. in 1177, applied for a subsidy towards carrying on the siege of Cuenca. Demands of money do not however seem to have been very usual before the prodigal reign of Alfonso X. That prince and his immediate successors were not much inclined to respect the rights of their subjects; but they

* Marina, Ensayo Hist Crit. cap 158. Teoria de las Cortes, t. ii p. 387. This is expressed in one of their fueros, or charters Liberi et ingenui semper manentis, reddendo mihi et successoribus meis in unoquoque anno in die Pentecostes de unaquaque domo 12 denarios; et, nisi cum bonâ voluntate vestrâ feceritis, nullum alium servitium faciatis

encountered a steady and insuperable resistance. Ferdinand IV., in 1307, promises to raise no money beyond his legal and customary dues. A more explicit law was enacted by Alfonso XI. in 1328, who bound himself not to exact from his people, or cause them to pay any tax, either partial or general, not hitherto established by law, without the previous grant of all the deputies convened to the cortes.* This abolition of illegal impositions was several times confirmed by the same prince. The cortes, in 1393, having made a grant to Henry III., annexed this condition, that "since they had granted him enough for his present necessities, and even to lay up a part for a future exigency, he should swear before one of the archbishops not to take or demand any money, service or loan, or any thing else of the cities and towns, nor of individuals belonging to them, on any pretence of necessity, until the three estates of the kingdom should first be duly summoned and assembled in cortes according to ancient usage. And if any such letters requiring money have been written, that they shall be *obeyed, and not complied with.*"† His son John II. having violated this constitutional privilege on the allega-

* De los con echar nin mandar pagar pecho desaforado ninguno, especial nin general, en toda mi tierra, sin ser llamados primeramente á cortes, é otorgado por todos los procuradores que hi vinieren p. 388

† Obedecidas é non cumplidas This expression occurs frequently in provisions made against illegal acts of the crown; and is characteristic of the singular respect with which the Spaniards always thought it right to treat their sovereign, while they were resisting the abuses of his authority.

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tion of a pressing necessity, the cortes in 1420 presented a long remonstrance couched in very respectful, but equally firm language, wherein they assert "the good custom founded in reason and in justice, that the cities and towns of your kingdoms shall not be compelled to pay taxes or requisitions or other new tribute, unless your highness order it by advice and with the grant of the said cities and towns, and of their deputies for them." And they express their apprehension lest this right should be infringed, because, as they say, "there remains no other privilege or liberty which can be profitable to subjects, if this be shaken."* the king gave them as full satisfaction as they desired, that his encroachments should not be drawn into precedent. Some fresh abuses, during the unfortunate reign of **Henry** IV., produced another declaration in equally explicit language, forming part of the sentence awarded by the arbitrators to whom the differences between the king and his people had been referred at Medina del Campo in 1465.† The catholic kings,

* La buena costumbre e possession fundada en razon è en justicia que las cibdades e villas de vuestros reinos tienen de no ser mandado coger monedas e pedidos nin otro tributo nuevo alguno en los vuestros reinos sin que la vuestra senoria lo faga con acuerdo de consejo e con otorgamiento de las cibdades e villas de los vuestros reinos è de sus procuradores en su nombre ** *** no queda otro previlegio ni libertad de que los subditos puedan gozar ni aprovechar quebrantado el sobre dicho [illegible] p 30

† Declaramos e ordenamos, que el dicho señor rei nin los otros reyes que despues del fueren non echan nin repartan nin pidan pedidos nin monedas en sus reynos, salvo por gran necessidad, è seyendo primero acordado con los perlados e grandes de sus reynos, è con los otros que a la sazon residieren en su consejo, e seyendo para ello llamados los procuradores de las

as they are eminently called, Ferdinand and Isabella, never violated this part of the constitution; nor did even Charles I., although sometimes refused money by the cortes, attempt to exact it without their consent.* In the Recopilacion, or code of Castilian law, published by Philip II., we read a positive declaration against arbitrary imposition of taxes, which remained unaltered on the face of the statute-book till the present age † The law was indeed frequently broken by Philip II.; but the cortes, who retained throughout the sixteenth century a degree of steadiness and courage truly admirable, when we consider their political weakness, did not cease to remonstrate with that suspicious tyrant, and recorded their unavailing appeal to the law of Alfonso XI., "so ancient and just and which so long time has been used and observed." ‡

ciudades e villas de sus reynos, que para las tales cosas se suelen e acostumbran llamar e seyendo per los dichos procuradores otorgado el dicho pedimento e monedas &c. p. 391

* Marina has published two letters from Charles to the city of Toledo, in 1542 and 1543, requesting them to instruct their deputies to consent to a further grant of money, which they had refused to do without leave of their constituents. &c. p. 180 187

† &c. p. 393

‡ En las cortes de año de 70 y en las de 76 pedimos a v m fuese servido de no poner nuevos impuestos, rentas, pechos, ni derechos ni otros tributos particulares ni generales sin junta del reyno en cortes, como esta dispuesto por ley del señor rey Don Alonso y se agradeció a v m el daño grande que con las nuevas rentas habia resciebido el reino, suplicando a v m fuese servido de mandarle aliviar y descargar, y que en lo de adelante se les hiciesse merced de guardar las dichas leyes reales y que no se impusiessen nuevas rentas sin su asistencia, pues podria v m estar satisfecho de que el reino sirve en las cosas necessarias con toda lealtad y hasta ahora no se ha proveido lo susodicho, y el reino por la obligacion que tiene a pedir a v m guarde la dicha ley, y que no solamente han cessado las necessidades de los subditos y na-

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SPAIN.

Controul of cortes over expenditure.

The free assent of the people by their representatives to grants of money was by no means a mere matter of form. It was connected with other essential rights, indispensable to its effectual exercise; those of examining public accounts and checking the expenditure. The cortes, in the best times at least, were careful to grant no money, until they were assured that what had been already levied on their constituents had been *properly employed.** *They refused a subsidy in* 1390, because they had already given so much, and "not knowing how so great a sum had been expended, it would be a great dishonour and mischief to promise any more." In 1406 they stood out a long time, and at length gave only half of what was demanded †. Charles I. attempted to obtain money, in 1527, from the nobility, as well as commons. But the former protested, that "their obligation was to follow the king in war, wherefore to contribute money was totally against their privilege, and for that reason they could not acquiesce in his majesty's request."‡ The commons also refused upon this occasion. In 1538, on a similar proposition, the superior and

turales de v m pero antes cuesten de cada dia vuelve a suplicar a v m sea servido conceederle lo susodicho, y que las nuevas rentas, pechos y derechos se quiten, y que de aqui adelante se guarde la dicha ley del señor rey don Alonso, como tan antigua y justa y que tanto tiempo se uso y guardo.—p 395. This petition was in 1570.

* Marina, t ii. p 404 406.

† p 409

‡ Pero que contribuir a la guerra con ciertas sumas era totalmente opuesto a sus previlegios, y asi que no podrian acomodarse a lo que s. m deseaba.—p 411.

lower nobility (los grandes y caballeros) "begged with all humility that they might never hear any more of that matter."*

The contributions granted by cortes were assessed and collected by respectable individuals (hombres buenos) of the several towns and villages.† This *repartition*, as the French call it, of direct taxes, is a matter of the highest importance in those countries where they are *imposed by means of a gross assessment on a district*. The produce was paid to the royal council. It could not be applied to any other purpose than that to which the tax had been appropriated. Thus the cortes of Segovia in 1407 granted a subsidy for the war against Granada on condition "that it should not be laid out on any other service except this war," which they requested the queen and Ferdinand, both regents in John II.'s minority, to confirm by oath. Part however of the money remaining unexpended, Ferdinand wished to apply it to his own object of procuring the crown of Aragon, but the queen first obtained not only a release from her oath by the pope, but the consent of the cortes. They continued to insist upon this appropriation, though ineffectually, under the reign of Charles I.‡

The cortes did not consider it beyond the line of their duty, notwithstanding the respectful manner in which they always addressed the sovereign, to remonstrate against profuse expenditure even

* Marina, t. ii. p. 411. ‡ p. 412
† p. 398.

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in his own household. They told Alfonso X. in 1258, in the homely style of that age, that they thought it fitting that the king and his wife should eat at the rate of a hundred and fifty maravedis a day, and no more; and that the king should order his attendants to eat more moderately than they did.* They remonstrated more forcibly against the prodigality of John II. Even in 1559, *they spoke with an undaunted Castilian spirit to Philip II.*; "Sir, the expenses of your royal establishment and household are much increased; and we conceive it would much redound to the good of these kingdoms, that your majesty should direct them to be lowered, both as a relief to your wants and that all the great men and other subjects of your majesty may take example therefrom to restrain the great disorder and excess they commit in that respect."†

Forms of the cortes

The forms of a Castilian cortes were analogous to those of an English parliament in the fourteenth century. They were summoned by a writ almost exactly coincident in expression with that in use among us.‡ The session was opened by a speech from the chancellor or other chief officer of the court. The deputies were invited to consider certain special business, and commonly to grant money.§ After the principal affairs were

* Mariana, t. ii. p. 117.

† Senhor, los gastos de vuestro real estado y mesa son muy crescidos, y entendemos que conviene mucho al bien de estos reinos que V. M. los mandasse moderar assi para algun remedio de sus necessidades como para que de V. M. tomen egemplo todos los grandes y caballeros y otros subditos de V. M. en la gran desorden y excessos que hacen en las cosas sobredichas.—p. 437.

‡ T. i. p. 175. t. iii. p. 103

§ T. i. p. 278

dispatched, they conferred together, and, having examined the instructions of their respective constituents, drew up a schedule of petitions. These were duly answered one by one, and from the petition and answer, if favourable, laws were afterwards drawn up, where the matter required a new law, or promises of redress were given, if the petition related to an abuse or grievance. In the struggling condition of Spanish liberty under Charles I., the crown began to neglect answering the petitions of cortes, or to use unsatisfactory generalities of expression. This gave rise to many remonstrances. The deputies insisted in 1523 on having answers before they granted money. They repeated the same contention in 1525, and obtained a general law, inserted in the Recopilacion enacting that the king should answer all their petitions before he dissolved the assembly.* This however was disregarded as before: but the cortes, whose intrepid honesty under Philip II. so often attracts our admiration, continued, as late as 1586, to appeal to the written statute, and lament its violation.†

Right of cortes in legislation.

According to the ancient fundamental constitution of Castile, the king did not legislate for his subjects without their consent. The code of the Visigoths, called in Spain the Fuero Jusgo, was enacted in public councils, as were also the laws of the early kings of Leon, which appears by the reciting words of their preambles.‡ This consent

* Marina, t. i. p. 301.
† p. 288—304.
‡ t. ii. p. 202. The acts of the cortes of Leon in 1020 run thus

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was originally given only by the higher estates, who might be considered, in a large sense, as representing the nation, though not chosen by it; but from the end of the twelfth century, by the *elected deputies of the commons in cortes*. The laws of Alfonso X. in 1258, those of the same prince in 1274, and many others in subsequent times, are declared to be made with the consent (con acuerdo) of the several orders of the kingdom. More commonly indeed, the preamble of Castilian statutes only recites their advice (consejo); but I do not know that any stress is to be laid on this circumstance. * The laws of the Siete Partidas, compiled by Alfonso X., did not obtain any direct sanction till the famous cortes of Alcala in 1348, when they were confirmed, along with several others, forming altogether the basis of the statute-law of Spain.* Whether they were in fact received before that time, has been a matter controverted among Spanish antiquaries, and upon the question of their legal validity at the time of their promulgation, depends an important point in Castilian history, the disputed right of succession between Sancho IV. and the infants of la Cerda; the

omnes pontifices et abbates et optimates regni Hispania jussu ipsius regis talia decreta decrevimus quæ firmiter teneantur futuris temporibus So those of Salamanca in 1178 Ego rex Fernandus inter cætera quæ cum episcopis et abbatibus regni nostri et quamplurimis aliis religiosis, cum comitibus terrarum et principibus et rectoribus provinciarum, toto posse tenenda statuimus apud Salamancam.

* Ensayo Hist Crit. p. 353. Teoria de las Cortes, t ii p. 77 Marina seems to have changed his opinion between the publication of these two works, in the former of which he contends for the previous authority of the Siete Partidas, and in favour of the infants of la Cerda.

former claiming under the ancient customary law, the latter under the new dispositions of the Siete Partidas. If the king could not legally change the established laws without consent of his cortes, as seems most probable, the right of representative succession did not exist in favour of his grandchildren, and Sancho IV. cannot be considered as an usurper.

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It appears upon the whole to have been a constitutional principle, that laws could neither be made nor annulled except in cortes. In 1506, this is claimed by the deputies as an established right.* John the First had long before admitted, that what was done by cortes and general assemblies could not be undone by letters missive, but by such cortes and assemblies alone.† For the kings of Castile had adopted the English practice, of dispensing with statutes by a non obstante clause in their grants. But the cortes remonstrated more steadily against this abuse than our own parliament, who suffered it to remain in a certain degree, till the revolution. It was several times enacted upon their petition, especially by an explicit statute of Henry II., that grants and letters patent dispensing with statutes should not be obeyed.‡ Nevertheless John II., trusting to force or the

* Los reyes establicieron que cuando habuessen de hacer leyes, para que fuessen provechosas a sus reynos y cada provincias fuesen provvidas, se llamasen cortes y procuradores que entendiessen en ellas y por esto se estableció lei que no se hiciesen ni renovasen leyes sino en cortes. Teoria de las Cortes, t. ii. p. 218.

† Lo que es fecho por cortes o por ayuntamientos que non se pueda disfacer por las tales cartas, salvo por ayuntamientos o cortes. p. 215.

‡ p. 215.

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servility of the judges, had the assurance to dispense explicitly with this very law.* The cortes of Valladolid, in 1442, obtained fresh promises and enactments against such an abuse. Philip I. and Charles V. began to legislate without asking the consent of cortes; this grew much worse under Philip II., and reached its height under his successors, who entirely abolished all constitutional privileges.† In 1555, we find a petition that laws made in cortes should be revoked no where else. The reply was such as became that age: "To this we answer, that we shall do what best suits our government." But even in 1619, and still afterwards, the patriot representatives of Castile continued to lift an unavailing voice against illegal ordinances, though in the form of very humble petition, perhaps the latest testimonies to the expiring liberties of their country.‡ The denial of exclusive legislative authority to the crown must, however, be understood to admit the legality of particular ordinances, designed to strengthen the king's executive government.§ These, no doubt, like the royal proclamations in England, extended sometimes very far, and subjected the people to a sort of arbitrary coercion much beyond what our enlightened notions of freedom would consider as reconcileable to it. But in the middle ages, such

* p. 216 t. ii. p. 40

† t. ii. p. 218

‡ Ha suplicado el reino a v. m. no se promulguen nuevas leyes, ni en todo ni en parte las antiguas se alteren sin que sea por cortes . . . y por ser de tanta importancia vuelve el reino a suplicarlo humilmente a v. m.—p. 220

§ p. 207

temporary commands and prohibitions, were not reckoned strictly legislative, and passed, perhaps rightly, for inevitable consequences of a scanty code, and short sessions of the national council.*

The kings were obliged to swear to the observance of laws enacted in cortes, besides their general coronation oath to keep the laws and preserve the liberties of their people. Of this we find several instances from the middle of the thirteenth century, and the practice continued till the time of John II., who, in 1433, on being requested to swear to the laws then enacted, answered, that he intended to maintain them, and consequently no oath was necessary; an evasion, in which the cortes seem unaccountably to have acquiesced.* The guardians of Alfonso XI. not only swore to observe all that had been agreed on at Burgos in 1315, but consented that if any one of them did not keep his oath, the people should no longer be obliged to regard or obey him as regent.†

Other objects of the cortes

It was customary to assemble the cortes of Castile for many purposes, besides those of granting money and concurring in legislation. They were summoned in every reign to acknowledge and confirm the succession of the heir apparent, and upon his accession to swear allegiance.‡ These acts were however little more than formal, and accordingly have been preserved for the sake of parade, after all the real dignity of the cortes was annihi-

* Teoria de las Cortes, t. i. p. 306

† t. iii. p. 62

‡ t. i. p. 33. t. ii. p. 24

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lated. In the fourteenth and fifteenth centuries, they claimed and exercised far more ample powers than our own parliament ever enjoyed. They assumed the right, when questions of regency occurred, to limit the prerogative, as well as to designate the persons who were to use it.* And the frequent minorities of Castilian kings, which were unfavourable enough to tranquillity and subordination, served to confirm these parliamentary privileges. The cortes were usually consulted upon all material business. A law of Alfonso XI. in 1328, printed in the Recopilacion or code published by Philip II., declares, "Since in the arduous affairs of our kingdom, the counsel of our natural subjects is necessary, especially of the deputies from our cities and towns, therefore we ordain and command that on such great occasions the cortes shall be assembled, and counsel shall be taken of the three estates of our kingdoms, as the kings our forefathers have been used to do."† A cortes of John II. in 1419, claimed this right of being consulted in all matters of importance, with a warm remonstrance against the alleged violation of so wholesome a law by the reigning prince; who answered that in weighty matters he had acted, and would continue to act, in conformity to it.‡ What should be intended by great and weighty affairs, might be not at all agreed upon by the two parties, to each of whose interpretations

* Teoria de las Cortes, p. 230
† t. i. p. 31.
‡ p. 34.

these words gave pretty full scope. However, the current usage of the monarchy certainly permitted much authority in public deliberations to the cortes. Among other instances, which indeed will continually be found in the common civil histories, the cortes of Orcano in 1469 remonstrate with Henry IV. for allying himself with England rather than France, and give as the first reason of complaint, that "according to the laws of your kingdom, when the kings have any thing of great importance in hand, they ought not to undertake it without advice and knowledge of the chief towns and cities of your kingdom." * This privilege of general interference was asserted, like other ancient rights, under Charles, whom they strongly urged, in 1548, not to permit his son Philip to depart out of the realm.† It is hardly necessary to observe, that in such times they had little chance of being regarded.

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The kings of Leon and Castile acted, during the interval of the cortes, by the advice of a smaller council, answering, as it seems, almost exactly to the king's ordinary council in England. In early ages, before the introduction of the commons, it is sometimes difficult to distinguish this body from the general council of the nation, being composed, in fact, of the same class of persons, though in smaller numbers. A similar difficulty applies to

Council of Castile.

* Porque, segunt leyes de nuestros reynos, cuando los reyes han de facer alguna cosa de gran importancia, non lo deben facer sin consejo é sabiduria de las cibdades e villas principales de vuestros reynos. Teoria de las Cortes, t. ii. p. 241.

† t. iii. p. 187.

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the English history. The nature of their proceedings seems best to ascertain the distinction. All executive acts, including those ordinances which may appear rather of a legislative nature, all grants and charters, are declared to be with the assent of the court (curia), or of the magnats of the palace, or of the chiefs or nobles.* This privy council was an essential part of all European monarchies. And, though the sovereign might be considered as free to call in the advice of whomsoever he pleased, yet, in fact, the princes of the blood and most powerful nobility had anciently a constitutional right to be members of such a council; so that it formed a very material check upon his personal authority.

The council underwent several changes, in progress of time, which it is not necessary to enumerate. It was justly deemed an important member of the constitution, and the cortes shewed a laudable anxiety to procure its composition in such a manner as to form a guarantee for the due execution of laws after their own dissolution. Several times, especially in minorities, they even named its members, or a part of them; and in the reigns of Henry III. and John II. they obtained the privilege of adding a permanent deputation, consisting of four persons elected out of their own body, annexed as it were to the council, who were to continue at the court during the interval

* Cum assensu magnatum palatii: Cum consilio curiæ meæ: Cum consilio et beneplacito omnium principum meorum, nullo contradicente nec reclamante. p. 325

of cortes, and watch over the due observance of the laws.* This deputation continued, as an empty formality, in the sixteenth century. In the council the king was bound to sit personally three days in the week. Their business, which included the whole executive government, was distributed with considerable accuracy into what might be dispatched by the council alone, under their own seals and signatures, and what required the royal seal.† The consent of this body was necessary for almost every act of the crown, for pensions or grants of money, ecclesiastical and political promotions, and for charters of pardon, the easy concession of which was a great encouragement to the homicides so usual in those ages, and was restrained by some of our own laws.‡ But the council did not exercise any judicial authority, if we may believe the well-informed author, from whom I have learned these particulars; unlike, in this, to the ordinary council of the kings of England. It was not until the days of Ferdinand and Isabella, that this, among other innovations, was introduced.§

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Civil and criminal justice was administered, in the first instance, by the alcaldes, or municipal judges of towns, elected within themselves, originally, by the community at large, but, in subsequent times, by the governing body. In other places, a lord possessed the right of juris-

Administration of justice

* Teoria de las Cortes, t. ii. p. 346.
† p. 251
‡ p. 360. 362. 372
§ p. 375. 379.

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diction, by grant from the crown, not, what we find in countries where the feudal system was more thoroughly established, as incident to his own territorial superiority. The kings, however, began in the thirteenth century to appoint judges of their own, called corregidores, a name which seems to express concurrent jurisdiction with the regidores, or ordinary magistrates.* The cortes frequently remonstrated against this encroachment. Alfonso XI. consented to withdraw his judges from all corporations by which he had not been requested to appoint them.† Some attempts to interfere with the municipal authorities of Toledo produced serious disturbances under Henry III. and John II.‡ Even where the king appointed magistrates at a city's request, he was bound to select them from among the citizens.§ From this immediate jurisdiction, an appeal lay to the adelantado, or governor of the province, and from thence to the tribunal of royal alcaldes.‖ The latter, however, could not take cognizance of any cause depending before the ordinary judges; a contrast to the practice of Aragon, where the justiciary's right of evocation (juris firma) was considered as a principal safeguard of public liberty.¶ As a court of appeal, the royal alcaldes had the supreme jurisdiction. The king could

* Alfonso X. says Ningun ome sea osado jusgar pleytos, se no fuere alcalde puesto por el rey. fol. 27. This seems an encroachment on the municipal magistrates.

† Teoria de las Cortes, p. 251.

‡ p. 255. Mariana, l. xx c. 13.

§ p. 255.

‖ p. 266.

¶ p. 260

only cause their sentence to be reviewed, but neither alter nor revoke it.* They have continued to the present day as a criminal tribunal; but civil appeals were transferred by the ordinances of Toro in 1371 to a new court, styled the king's audience, which, though deprived under Ferdinand and his successors of part of its jurisdiction, still remains one of the principal judicatures in Castile.†

Violent actions of some kings of Castile

No people in a half-civilized state of society have a full practical security against particular acts of arbitrary power. They were more common perhaps in Castile than in any other European monarchy, which professed to be free. Laws indeed were not wanting to protect men's lives and liberties, as well as their properties. Ferdinand IV. in 1299, agreed to a petition that "justice shall be executed impartially according to law and right; and that no one shall be put to death or imprisoned, or deprived of his possessions without trial, and that this be better observed than heretofore."‡ He renewed the same law in 1307. Nevertheless, the most remarkable circumstance of this monarch's history was a violation of so sacred and apparently so well established a law. Two gentlemen having been accused of murder, Ferdinand, without waiting for any pro-

* p. 287. 304.

† p. 292—302.

‡ Que mandase facer la justicia en aquellos que la merecen comunalmente con fuero é con derecho; é los homes que non sean muertos nin presos nin tomados lo que han sua ser oidos por derecho ó por fuero de aquel logar do acaeciere, é que sea guardado mejor que es guardó fasta aquí. Marina, Ensayo Hist. Critico, p. 148.

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cess, ordered them to instant execution. They summoned him with their last words to appear before the tribunal of God in thirty days; and his death within the time, which has given him the sirname of the Summoned, might, we may hope, deter succeeding sovereigns from iniquity so flagrant. But from the practice of causing their enemies to be assassinated, neither law nor conscience could withhold them. Alfonso XI. was more than once guilty of this crime. Yet he too passed an ordinance in 1325 that no warrant should issue for putting any one to death, or seizing his property, till he should be duly tried by course of law. Henry II. repeats the same law in very explicit language.* But the civil history of Spain displays several violations of it. An extraordinary prerogative of committing murder appears to have been admitted, in early times, by several nations who did not acknowledge unlimited power in their sovereign.† Before any regular police was established, a powerful criminal might have been secure from all punishment, but for a notion, as barbarous as any which it served to counteract, that he could be lawfully killed by the personal mandate of the king. And the

* Que non mandemos matar nin prender nin lisiar nin despechar nin tomar à alguno ninguna cosa de lo suyo, sin ser antes llamado e oido e vencido por fuero é por derecho, por querella nin por querellas que a nos fuesen dadas, segunt que esto esta ordenado por el rei don Alonso nuestro padre. Teoria de las Cortes, t. ii. p. 287.

† Si quis hominem per jussionem regis vel ducis sui occiderit, non requiratur ei, nec sit faidosus, quia jussio domini sui fuit, et non potuit contradicere jussionem. Leges Bajuvariorum, tit. ii. in Balus. Capitularibus.

frequent attendance of sovereigns in their courts of judicature might lead men not accustomed to consider the indispensable necessity of legal forms, to confound an act of assassination with the execution of justice.

Confederacies of the nobility

Though it is very improbable that the nobility were not considered as essential members of the cortes, they certainly attended in smaller numbers than we should expect to find from the great legislative and deliberative authority of that assembly. This arose chiefly from the lawless spirit of that martial aristocracy, which placed less confidence in the constitutional methods of resisting arbitrary encroachment, than in its own armed combinations.* Such confederacies to obtain redress of grievances by force, of which there were five or six remarkable instances, were called *Hermandad* (brotherhood or union), and though not so explicitly sanctioned as they were by the celebrated Privilege of Union in Aragon, found countenance in a law of Alfonso X. which cannot be deemed so much to have voluntarily emanated from that prince as to be a record of original rights possessed by the Castilian nobility. "The duty of subjects towards their king," he says, "enjoins them not to permit him knowingly to endanger his salvation, nor to incur dishonour and inconvenience in his person or family, nor to produce mischief to his kingdom. And this may be fulfilled in two ways; one by good advice, shewing him the reason where-

* Teoria de las Cortes, t. ii. p. 465.

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fore he ought not to act thus; the other by deeds, seeking means to prevent his going on to his own ruin, and putting a stop to those who give him ill counsel, forasmuch as his errors are of worse consequence than those of other men, it is the bounden duty of subjects to prevent his committing them."* To this law the insurgents appealed, in their coalition against Alvaro de Luna; and indeed we must confess, that however just and admirable the principles which it breathes, so general a licence of rebellion was not likely to preserve the tranquillity of a kingdom. The deputies of towns in a cortes of 1445 petitioned the king to declare that no construction should be put on this law, inconsistent with the obedience of subjects towards their sovereign; a request to which of course he willingly acceded.

Castile, it will be apparent, bore a closer analogy to England in its form of civil polity, than France or even Aragon. But the frequent disorders of its government and a barbarous state of manners, rendered violations of law much more continual and flagrant than they were in England under the Plantagenet dynasty. And besides these practical mischiefs, there were two essential defects in the constitution of Castile, through which perhaps it was ultimately subverted. It wanted those two brilliants in the coronet of British liberty, the representation of freeholders among the commons, and trial by jury. The cortes of Castile became a

* Ensayo Hist. Critico, p. 312.

congress of deputies from a few cities, public-spirited indeed and intrepid, as we find them in bad times, in an eminent degree, but too much limited in number, and too unconnected with the territorial aristocracy, to maintain a just balance against the crown. Yet with every disadvantage, that country possessed a liberal form of government, and was animated with a noble spirit for its defence. Spain, in her late memorable though short resuscitation, might well have gone back to her ancient institutions, and perfected a scheme of policy which the great example of England would have shewn to be well adapted to the security of freedom. What she did, or rather attempted instead, I need not recall. May her next effort be more wisely planned, and more happily terminated![*]

Affairs of Aragon.

Though the kingdom of Aragon was very inferior in extent to that of Castile, yet the advantages of a better form of government and wiser sovereigns, with those of industry and commerce along a line of sea coast, rendered it almost equal in importance. Castile rarely intermeddled in the civil dissensions of Aragon; the kings of Aragon frequently carried their arms into the heart of Castile. During the sanguinary outrages of Peter the Cruel, and the stormy revolutions which ended in establishing the house of Trastamare, Aragon was not indeed at peace, nor altogether well governed; but her political consequence rose in the eyes of Europe through the long reign of the ambitious and

[*] The first edition of this work was published in 1818.

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wily Peter IV., whose sagacity and good fortune redeemed, according to the common notions of mankind, the iniquity with which he stripped his relation the king of Majorca of the Balearic islands, and the constant perfidiousness of his character. I have mentioned in another place the Sicilian war, prosecuted with so much eagerness for many years by Peter III. and his son Alfonso III. After this object was relinquished, James II. undertook an enterprise less splendid, but not much less difficult, the conquest of Sardinia. That island, long accustomed to independence, cost an incredible expense of blood and treasure to the kings of Aragon during the whole fourteenth century. It was not fully subdued till the commencement of the next, under the reign of Martin.

Disputed succession after the death of Martin.

At the death of Martin, king of Aragon, in 1410, a memorable question arose as to the right of succession. Though Petronilla, daughter of Ramiro II., had reigned in her own right from 1137 to 1172, an opinion seems to have gained ground from the thirteenth century, that females could not inherit the crown of Aragon. Peter IV. had excited a civil war by attempting to settle the succession upon his daughter, to the exclusion of his next brother. The birth of a son about the same time suspended the ultimate decision of this question; but it was tacitly understood that what is called the Salic law ought to prevail.* Accord-

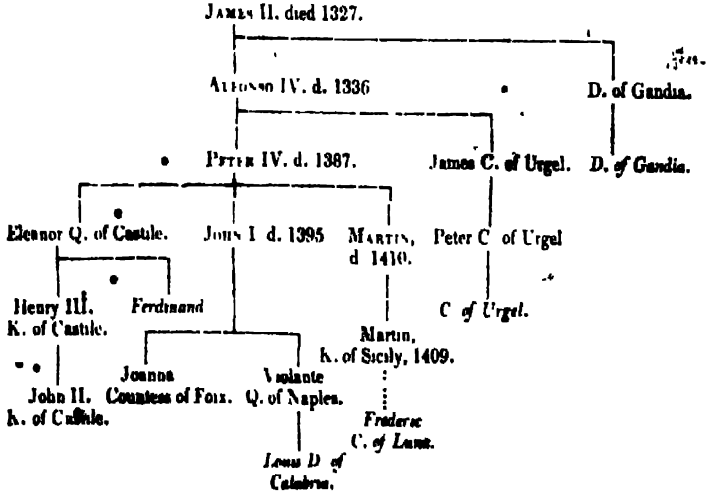
* Zurita, t. ii. f. 188. It was pretended that women were excluded from the crown in England as well as France and this analogy seems to have had some influence in determining the Aragonese to adopt a Salic law

ingly on the death of John I. in 1395 his two daughters were set aside in favour of his brother Martin, though without opposition on the part of the elder, whose husband, the count of Foix, invaded the kingdom, and desisted from his pretension only through want of force. Martin's son, the king of Sicily, dying in his father's life-time, the nation was anxious that the king should fix upon his successor, and would probably have acquiesced in his choice. But his dissolution occurring more rapidly than was expected, the throne remained absolutely vacant. The count of Urgel had obtained a grant of the lieutenancy, which was the right of the heir apparent. This nobleman possessed an extensive territory in Catalonia, bordering on the Pyrenees. He was grandson of James, next brother to Peter IV. and, according to our rules of inheritance, certainly stood in the first place. The other claimants were the duke of Gandia, grandson of James II., who, though descended from a more distant ancestor, set up a claim founded on proximity to the royal stock, which in some countries was preferred to a representative title; the duke of Calabria, son of Violante, younger daughter of John I. (the countess of Foix being childless); Frederic count of Luna, a natural son of the younger Martin, king of Sicily, legitimated by the pope, but with a reservation excluding him from royal succession; and finally, Ferdinand infant of Castile, son of the late king's

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sister.* The count of Urgel was favoured in general by the Catalans, and he seemed to have a powerful support in Antonio de Luna, a baron of Aragon so rich, that he might go through his own estate from France to Castile. But this apparent superiority frustrated his hopes. The justiciary and other leading Aragonese were determined not to suffer this great constitutional question to be decided by an appeal to force, which might sweep away their liberties in the struggle. Urgel, confident of his right, and surrounded by men of ruined fortunes, was unwilling to submit his pretensions to a civil tribunal. His adherent, Antonio de Luna, committed an extraordinary outrage, the assassination of the archbishop of Saragosa, which alienated the minds of good citizens from his cause. On the other hand, neither the

* The subjoined pedigree will show more clearly the respective titles of the competitors.



duke of Gandia, who was very old,* nor the count of Luna, seemed fit to succeed. The party of Ferdinand, therefore, gained ground by degrees. It was determined, however, to render a legal sentence. The cortes of each nation agreed upon the nomination of nine persons, three Aragonese, three Catalans, and three Valencians, who were to discuss the pretensions of the several competitors, and by a plurality of six votes to adjudge the crown. Nothing could be more solemn, more peaceful, nor, in appearance, more equitable than the proceedings of this tribunal. They summoned the claimants before them, and heard them by counsel. One of these, Frederic of Luna, being ill defended, the court took charge of his interests, and named other advocates to maintain them. A month was passed in hearing arguments, a second was allotted to considering them; and at the expiration of the prescribed time, it was announced to the people by the mouth of St. Vincent Ferrier, that Ferdinand of Castile had ascended the throne.†

* This Duke of Gandia died during the interregnum. His son, though not so objectionable on the score of age, seemed to have a worse claim, yet he became a competitor

† Blancæ Commentaria, in Schotti Hispania Illustrata, t. ii. Zurita, t. iii. f. 1—74. Vincent Ferrier was the most distinguished churchman of his time in Spain. His influence, as one of the nine judges, is said to have been very instrumental in procuring the crown for Ferdinand. Five others voted the same way, one for the count of Urgel, one doubtfully between the count of Urgel and duke of Gandia, the ninth declined to vote. Zurita, t. iii. f. 71. It is curious enough, that John king of Castile was altogether disregarded, though his claim was at least as plausible as that of his uncle Ferdinand. Indeed upon the principles of inheritance to which we are accustomed, Louis duke of Calabria had a prior right to Ferdinand, admitting the rule which it was necessary for both of them to establish, namely, that a right of succession might be transmitted

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Decision in favour of Ferdinand of Castile. 1412

In this decision, it is impossible not to suspect that the judges were swayed rather by politic considerations, than a strict sense of hereditary right. It was therefore by no means universally popular, especially in Catalonia, of which principality the count of Urgel was a native; and perhaps the great rebellion of the Catalans fifty years afterwards may be traced to the disaffection which this breach, as they thought, of the lawful succession had excited. Ferdinand however was well received in Aragon. The cortes generously recommended the count of Urgel to his favour, on account of the great expenses he had incurred in prosecuting his claim. But Urgel did not wait the effect of this recommendation. Unwisely attempting a rebellion with very inadequate means, he lost his estates, and was thrown for life into prison. Ferdinand's successor was his son

Alfonso V. 1416

Alfonso V. more distinguished in the history of Italy than of Spain. For all the latter years of his life, he never quitted the kingdom that he had acquired by his arms: and, enchanted by the delicious air of Naples, entrusted the government of his patrimonial territories to the care of a brother and an heir. John II., upon whom they devolved by the death of Alfonso without legitimate progeny, had been engaged during his youth in the turbulent revolutions of Castile, as the head of a strong party that opposed the domination of

John II 1458

through females, which females could not personally enjoy. This, as is well known, had been advanced in the preceding age by Edward III. as the foundation of his claim to the crown of France.

Alvaro de Luna. By marriage with the heiress of Navarre, he was entitled, according to the usage of those times, to assume the title of king, and administration of government during her life. 1420
But his ambitious retention of power still longer produced events which are the chief stain on his memory. Charles prince of Viana was, by the constitution of Navarre, entitled to succeed his mother. She had requested him in her testament 1442
not to assume the government without his father's consent. That consent was always withheld. The prince raised what we ought not to call a rebellion; but was made prisoner, and remained for some time in captivity. John's ill disposition towards his son was exasperated by a step-mother, who scarcely disguised her intention of placing her own child on the throne of Aragon at the expense of the eldest-born. After a life of perpetual oppression, chiefly passed in exile or captivity, the prince of Viana died in Catalonia, at a moment when that province was in open insurrection upon his account. Though it hardly seems that the 1461
Catalans had any more general provocations, they persevered for more than ten years with inveterate obstinacy in their rebellion; offering the sovereignty first to a prince of Portugal, and afterwards to Rene duke of Anjou, who was destined to pass his life in unsuccessful competition for kingdoms. The king of Aragon behaved with great clemency towards these insurgents on their final submission.

Constitution of Aragon.

It is consonant to the principle of this work,

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to pass lightly over the common details of history, in order to fix the reader's attention more fully on subjects of philosophical inquiry. Perhaps in no European monarchy, except our own, was the form of government more interesting than in Aragon, as a fortunate temperament of law and justice with the royal authority. So far as any thing can be pronounced of its earlier period before the capture of Saragosa in 1118, it was a kind of regal aristocracy, where a small number of powerful barons elected their sovereign on every vacancy, though, as usual in other countries, out of one family; and considered him as little more than the chief of their confederacy.* These were the ricoshombres or barons, the first order of the state. Among these the kings of Aragon, in subsequent times, as they extended their dominions, shared the conquered territory in grants of honours on a feudal tenure.† For this system was fully established in the kingdom of Aragon. A ricoshombre, as we read in Vitalis, bishop of Huesca, about the middle of the thirteenth cen-

Originally a sort of regal aristocracy.

Privileges of the ricoshombres or barons.

* Alfonso III complained, that his barons wanted to bring back old times, quando havia en el reyno tantos reyes como ricos hombres. Blancæ Commentaria, p 787. The form of election, supposed to have been used by these bold barons, is well known "We who are as good as you, chuse you for our king and lord, provided that you observe our laws and privileges, and if not, not" But I do not much believe the authenticity of this form of words. See Robertson's Charles V. vol i note 31 It is, however, sufficiently agreeable to the spirit of the old government

† Los ricos hombres, por los feudos que tenian del rey, eran obligados de seguir al rey, si yia en persona a la guerra, y residir en ella tres meses en cadaun año. Zurita, t. i. fol. 43. (Saragosa, 1610.) A fief was usually called in Aragon an honour, que en Castilla llamavan tierra, y en el principado de Cataluña feudo. fol. 46

tury,* must hold of the king an honour or barony capable of supporting more than three knights; and this he was bound to distribute among his vassals in military fiefs. Once in the year he might be summoned with his feudataries to serve the sovereign for two months (Zurita says three); and he was to attend the royal court, or general assembly, as a counsellor, whenever called upon, assisting in its judicial as well as deliberative business. In the towns and villages of his barony he might appoint bailiffs to administer justice, and receive penalties; but the higher criminal jurisdiction seems to have been reserved to the crown. According to Vitalis, the king could divest these ricoshombres of their honours at pleasure, after which they fell into the class of mesnadaries, or mere tenants in chief. But if this were constitutional in the reign of James I., which Blancas denies, it was not long permitted by that high-spirited aristocracy. By the General Privilege or Charter of Pedro III. it is declared that no barony can be taken away without a just cause and legal sentence of the justiciary and council of barons.† And the same protection was extended to the vassals of the ricoshombres.

Below these superior nobles were the mesnada-

* I do not know whether this work of Vitalis has been printed, but there are large extracts from it in Blancas's history, and also in Du Cange, under the words Infantia, Mesnadarius, &c. Several illustrations of these military tenures may be found in the Fueros de Aragon, especially lib. 7.

† Blancæ Comm. p. 730.

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ries, corresponding to our mere tenants in chief, holding estates not baronial immediately from the crown; and the military vassals of the high nobility, the knights and *infanzones;* a word which may be rendered by gentlemen. These had considerable privileges in that aristocratic government; they were exempted from all taxes, they could only be tried by the royal judges for any crime, and offences committed against them were punished with additional severity.* The ignoble classes were, as in other countries, the burgesses of towns, and the villeins or peasantry. The peasantry seem to have been subject to territorial servitude, as in France and England. Vitalis says, that some villeins were originally so unprotected, that, as he expresses it, they might be divided into pieces by the sword among the sons of their masters; till they were provoked to an insurrection, which ended in establishing certain stipulations, whence they obtained the denomination of villeins *de paruda*, or of [illegible].†

Burgesses and peasantry.

Though from the twelfth century the principle of hereditary succession to the throne superseded, in Aragon as well as Castile, the original right of chusing a sovereign within the royal family, it was still founded upon one more sacred and fundamental, that of compact. No king of Aragon was entitled to assume that name, until he had taken a coronation oath, administered by

Liberties of the Aragonese kingdom.

* Blanca Comm p 732 † p. 729.

the justiciary at Saragosa, to observe the laws and liberties of the realm.* Alfonso III., in 1285, being in France at the time of his father's death, named himself king in addressing the states, who immediately remonstrated on this premature assumption of his title, and obtained an apology.† Thus too Martin, having been called to the crown of Aragon by the cortes, in 1395, was specially required not to exercise any authority before his coronation.‡

Blancas quotes a noble passage from the acts of cortes in 1451. "We have always heard of old time, and it is found by experience, that, seeing the great barrenness of this land, and the poverty of the realm, if it were not for the liberties thereof, the folk would go hence to live and abide in other realms, and lands more fruitful."§ This high spirit of freedom had long animated the Aragonese. After several contests

* Zurita, Anales de Aragon, t. i. fol. 104. t. iii. fol. 70.

† Blancæ Comm. p. 661. They acknowledged, at the same time, that he was their natural lord, and entitled to reign as lawful heir to his father—so oddly were the hereditary and elective titles jumbled together. Zurita, t. i. fol. 104.

‡ Zurita, t. iii. fol. 424.

§ Siempre havemos oydo dezir antiguament, è se troba por esperiencia, que attendida la grand sterilidad de aquesta tierra, è probreza de aquesto regno, si non fues por las libertades de aquel, se yrian a bivir, y habitar las gentes a otros regno, e tierras mas fructiferas. i. 701. Aragon was, in fact, a poor country, barren and ill-peopled. The kings were forced to go to Catalonia for money, and indeed were little able to maintain expensive contests. The wars of Peter IV. in Sardinia, and of Alfonso V. with Genoa and Naples, impoverished their people. A hearth-tax having been imposed in 1404, it was found that there were 42,683 houses in Aragon, which, according to most calculations, will not give much more than 200,000 inhabitants. In 1429, a similar tax being laid on, it is said

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with the crown in the reign of James I., not to go back to earlier times, they compelled Peter III. in 1283, to grant a law, called the General Privilege, the Magna Charta of Aragon, and perhaps a more full and satisfactory basis of civil liberty than our own. It contains a series of provisions against arbitrary tallages, spoliations of property, secret process after the manner of the Inquisition in criminal charges, sentences of the justiciary without assent of the cortes, appointment of foreigners or Jews to judicial offices, trials of accused persons in places beyond the kingdom, the use of torture, except in charges of falsifying the coin, and the bribery of judges. These are claimed as the ancient liberties of their country. "Absolute power, mero imperio è mixto, it is declared, never was the constitution of Aragon, nor of Valencia, nor yet of Ribagorça, nor shall there be in time to come any innovation made; but only the law, custom, and privilege which has been anciently used in the aforesaid kingdoms."*

General Privilege of 1283.

Privilege of Union

The concessions extorted by our ancestors from John, Henry III., and Edward I., were secured by the only guarantee those times could afford, the determination of the barons to enforce them by armed confederacies. These, however, were formed according to emergencies, and, except in

that the number of houses was diminished in consequence of war. Zurita, t. iii. fol. 180. It contains at present between 600,000 and 700,000 inhabitants.

* Fueros de Aragon, fol. 9. Zurita, t. i. fol. 265.

the famous commission of twenty-five conservators of Magna Charta, in the last year of John, were certainly unwarranted by law. But the Aragonese established a positive right of maintaining their liberties by arms. This was contained in the Privilege of Union granted by Alfonso III. in 1287, after a violent conflict with his subjects; but which was afterwards so completely abolished and even eradicated from the records of the kingdom, that its precise words have never been recovered.* According to Zurita, it consisted of two articles: first, that in the case of the king's proceeding forcibly against any member of the union without previous sentence of the justiciary, the rest should be absolved from their allegiance; secondly, that he should hold cortes every year in Saragosa.† During the two subsequent reigns of James II. and Alfonso IV. little pretence seems to have been given for the exercise of this right. But dissensions breaking out under Peter IV. in 1347, rather on account of his attempt to settle the crown upon his daughter, than of any specific public grievances, the nobles had recourse to the Union, that last voice, says Blancas, of an almost expiring state, full of weight and dignity, to chastise the presumption of kings.‡ They assem-

Revolt against Peter IV.

* Blancas says that he had discovered a copy of the Privilege of Union in the archives of the see of Tarragona, and would gladly have published it, but for his deference to the wisdom of former ages, which had studiously endeavoured to destroy all recollection of that dangerous law. p. 662.

† f. 1. fol. 322.

‡ Priscam illam Unionis, quasi morientis reipublicæ extremam vocem, auctoritatis et gravitatis plenam, regum insolentiæ apertum

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bled at Saragosa, and used a remarkable seal for all their public instruments; an engraving from which may be seen in the historian I have just quoted. It represents the king sitting on his throne, with the confederates kneeling in a supppliant attitude around, to denote their loyalty, and unwillingness to offend. But in the background tents and lines of spears are discovered, as a hint of their ability and resolution to defend themselves. The legend is Sigillum Unionis Aragonum. This respectful demeanour towards a sovereign against whom they were waging war, reminds us of the language held out by our Long Parliament, before the Presbyterian party was overthrown. And although it has been lightly censured as inconsistent and hypocritical, this tone is the safest that men can adopt, who, deeming themselves under the necessity of withstanding the reigning monarch, are anxious to avoid a change of dynasty, or subversion of their constitution. These confederates were defeated by the king at Epila in 1348.* But his prudence and the remaining strength of his opponents inducing him

vindicem exciturunt, summa ac singulari bonorum omnium consensione p 669 It is remarkable, that such strong language should have been tolerated under Philip II

* Zurita observes that the battle of Epila was the last fought in defence of public liberty, for which it was held lawful of old to take up arms, and resist the king, by virtue of the Privileges of Union For the authority of the justiciary being afterwards established, the former contentions and wars came to an end; means being found to put the weak on a level with the powerful, in which consists the peace and tranquillity of all states; and from thence the name of Union was, by common consent, proscribed. t ii. fol 226 Blancas also remarks, that nothing could have turned out more advantageous to the Aragonese, than their ill fortune at Epila.

to pursue a moderate course, there ensued a more legitimate and permanent balance of the constitution from this victory of the royalists. The Privilege of Union was abrogated, Peter himself cutting to pieces with his sword the original instrument. But in return many excellent laws for the security of the subject were enacted:* and their preservation was entrusted to the greatest officer of the kingdom, the justiciary, whose authority and pre-eminence may in a great degree be dated from this period.† That watchfulness over public liberty, which originally belonged to the aristocracy of ricos hombres, always apt to thwart the crown, or to oppress the people, and which was afterwards maintained by the dangerous privilege of union, became the duty of a civil magistrate, accustomed to legal rules, and responsible for his actions, whose office and functions are the most pleasing feature in the constitutional history of Aragon.

Privilege of Union abolished. Other provisions instituted.

The justiza or justiciary of Aragon has been treated by some writers as a sort of anomalous magistrate, created originally as an intermediate power between the king and people, to watch over the exercise of royal authority. But I do not perceive that his functions were, in any essential respect, different from those of the chief justice of England, divided, from the time of Edward I., among the judges of the King's Bench. We

Office of Justiciary.

* Fueros de Aragon De iis, quæ Dominus rex fol. 14. et alibi passim.

† Blanc Comm. p. 671. 811. Zurita, t. ii. fol. 229.

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should undervalue our own constitution by supposing that there did not reside in that court as perfect an authority to redress the subject's injuries, as was possessed by the Aragonese magistrate. In the practical exercise, indeed, of this power, there was an abundant difference. Our English judges, more timid and pliant, left to the remonstrances of parliament that redress of grievances which very frequently lay within the sphere of their jurisdiction. There is, I believe, no recorded instance of a habeas corpus granted in any case of illegal imprisonment by the crown or its officers during the continuance of the Plantagenet dynasty. We shall speedily take notice of a very different conduct in Aragon.

The office of justiciary, whatever conjectural antiquity some have assigned to it, is not to be traced beyond the capture of Saragosa in 1118, when the series of magistrates commences.* But for a great length of time they do not appear to have been particularly important; the judicial authority residing in the council of ricoshombres, whose suffrages the justiciary collected, in order to pronounce their sentence rather than his own. A passage in Vitalis, bishop of Huesca, whom I have already mentioned, shews this to have been the practice during the reign of James I.† Gra-

* Blancæ Comment. p. 638.

† Id. p. 722. Zurita indeed refers the justiciary's pre-eminence to an earlier date, namely, the reign of Peter II., who took away a great part of the local jurisdictions of the ricoshombres. t. i. fol. 102. But if I do not misunderstand the meaning of Vitalis, his testimony seems to be beyond dispute. By the General Privilege of 1283, the justiciary

dually, as notions of liberty became more definite, and laws more numerous, the reverence paid to their permanent interpreter grew stronger; and there was fortunately a succession of prudent and just men in that high office, through whom it acquired dignity and stable influence. Soon after the accession of James II., on some dissensions arising between the king and his barons, he called in the justiciary as a mediator, whose sentence, says Blancas, all obeyed.* At a subsequent time in the same reign, the military orders, pretending that some of their privileges were violated, raised a confederacy or union against the king. James offered to refer the dispute to the justiciary, Ximenes Salanova, a man of eminent legal knowledge. The knights resisted his jurisdiction, alledging the question to be of spiritual cognizance. He decided it however against them in full cortes at Saragosa, annulled their league, and sentenced the leaders to punishment.† It was adjudged also that no appeal could lie to the spiritual court from a sentence of the justiciary passed with assent of the cortes. James II. is said to have frequently sued his subjects in the justiciary's court, to shew his regard for legal measures; and during the reign of this good

was to advise with the ricoshombres, in all cases where the king was a party against any of his subjects Zurita, f. 281. See also f. 180.

* p. 663.

† Zurita, t. i. f. 403; t. ii f. 34. Blanc. p. 666. The assent of the cortes seems to render this in a nature of a legislative, rather than a judicial proceeding: but it is difficult to pronounce about a transaction so remote in time, and in a foreign country, the native historians writing rather concisely

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prince; its authority became more established.* Yet it was not perhaps looked upon as fully equal to maintain public liberty against the crown, till, in the cortes of 1348, after the Privilege of Union was for ever abolished, such laws were enacted, and such authority given to the justiciary, as proved eventually a more adequate barrier against oppression, than any other country could boast. All the royal as well as territorial judges were bound to apply for his opinion in case of legal difficulties arising in their courts, which he was to certify within eight days. By subsequent statutes of the same reign, it was made penal for any one to obtain letters from the king, impeding the execution of the justiza's process, and they were declared null. Inferior courts were forbidden to proceed in any business after his prohibition.† Many other laws might be cited, corroborating the authority of the great magistrate; but there are two parts of his remedial jurisdiction, which deserve special notice.

These are the processes of jurisfirma, or firma del derecho, and of manifestation. The former bears some analogy to the writs of *pone* and *certiorari* in England, through which the Court of King's Bench exercises its right of withdrawing a suit from the jurisdiction of inferior tribunals.

* Blanc. p 663 James acquired the surname of Just, el Justiciero, by his fair dealings towards his subjects. Zurita, t. ii fol 82

† Fueros de Aragon. Quod in dubius non crassis (A.D. 1348.) Quod impetrans, (1372,) &c. Zurita, t. ii fol. 229. Blanc. p 671 and 811

But the Aragonese jurisfirma was of more extensive operation. Its object was not only to bring a cause commenced in an inferior court before the justiciary, but to prevent or inhibit any process from issuing against the person who applied for its benefit, or any molestation from being offered to him; so that, as Blancas expresses it, when we have entered into a recognizance (firmè et graviter asseveremus) before the justiciary of Aragon to abide the decision of law, our fortunes shall be protected by the interposition of his prohibition, from the intolerable iniquity of the royal judges.* The process, termed manifestation, afforded as ample security for personal liberty as that of jurisfirma did for property. "To *manifest* any one," says the writer so often quoted, "is to wrest him from the hands of the royal officers, that he may not suffer any illegal violence; not that he is set at liberty by this process, because the merits of his case are still to be inquired into; but because he is now detained publicly, instead of being as it were concealed, and the charge against him is investigated, not suddenly or with passion, but in calmness and according to law, therefore this is called manifestation."† The power of this

* p 751 Fueros de Aragon, f 137.

† Est apud nos manifestare, reum subito sumere, atque è regis manibus extorquere, ne qua ipsi contra jus vis inferatur. Non quod tunc reus judicio liberetur, nihilominus tamen, ut loquimur, de meritis causæ ad plenum cognoscitur. Sed quod deinceps manifesto teneatur, quasi aulea crlatus extitisset, necesseque deinde sit de ipsius culpa, non impetu et cum furore, sed sedatis prorsus animis, et juxta constitutas leges judicari. Ex eo autem, quod hujusmodi judicium manifesto deprehensum, omnibus jam

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writ (if I may apply our term) was such, as he elsewhere asserts, that it would rescue a man

patere debeat, Manifestationis sibi nomen arripuit p 675

Ipsius Manifestationis potestas tam solida est et repentina, ut homini jam collum in laqueum inserenti subveniat Illius enim præsidio, damnatus, dum per leges licet, quasi experiendi juris gratiâ, de manibus judicum confestim extorquetur, et in carcerem ducitur ad id ædificatum, ibidemque asservatur tamdiu, quamdiu jurene, an injuria quid in ea causa factum fuerit, judicatur Propterea carcer hic vulgari lingua, la carcel de los manifestados nuncupatur, p 751

Fueros de Aragon, fol 60 De Manifestationibus personarum Independently of this right of manifestation by writ of the justiciary, there are several statutes in the Fueros against illegal detention, or unnecessary severity towards prisoners (De Custodia reorum, f 161) No judge could proceed secretly in a criminal process, an indispensable safeguard to public liberty, and one of the most salutary, as well as most ancient, provisions in our own constitution (De judicus) Torture was abolished, except in cases of coining false money, and then only in respect of vagabonds (General Privilege of 1283)

Zurita has explained the two processes of jurisfirma and manifestation so perspicuously, that, as the subject is very interesting and rather out of the common way, I shall both quote and translate the passage Con firmar de derecho, que es dar caution a estar a justicia, se conceden letras inhibitorias por el justicia de Aragon, para que no puedan ser presos, ni privados, ni despojados de su possession. hasta que judicialmente se conozca, y declare sobre la pretension, y justicia de las partes, y parezca por processo legitimo, que se deve revocar la tal inhibition. Esta fué la suprema y principal autoridad del Justicia de Aragon desde que este magistrado tuvo origen, y lo que llama manifestation, porque assi como la firma de derecho por privilegio general del reyno impide, que no puede ninguno ser preso, o agraviado contra razon y justicia, de la misma manera la manifestacion, que es otro privilegio, y remedio muy principal, tiene fuerça, quando alguno es preso sin preceder processo legitimo, o quando lo prenden de hecho sin orden de justicia, y en estos casos solo el Justicia de Aragon, quando se tiene recurso al el, se interpone, manifestando il preso, que es tomarlo a su mano, de poder de qualquiera juez, aunque sea el mas supremo, y es obligado el Justicia de Aragon, y sus lugartenientes de proveer la manifestacion en el mismo instante, que les es pedida sin preceder informacion; y basta que se pida por qualquiere persona que se diga procurador del que quiere que lo tengan por manifesto t n fol 380 "Upon a firma de derecho, which is to give security for abiding the decision of law, the Justiciary of Aragon issues letters inhibiting all persons to arrest the party, or deprive him of his possession, until the matter shall be judicially inquired into, and it shall appear that such inhibition ought to be revoked. This process, and that which is called manifestation have

whose neck was in the halter. A particular prison was allotted to those detained for trial under this process. CHAP. IV. SPAIN.

Several proofs that such admirable provisions did not remain a dead letter in the law of Aragon, appear in the two historians, Blancas and Zurita, whose noble attachment to liberties, of which they had either witnessed, or might foretell the extinction, continually displays itself. I cannot help illustrating this subject by two remarkable instances. The heir apparent of the kingdom of Aragon had a constitutional right to the lieutenancy, or regency, during the sovereign's absence from the realm. The title and office indeed were permanent, though the functions must of course have been superseded during the personal exercise of royal authority. But as neither Catalonia nor Valencia, which often demanded the king's presence, were considered as parts of the kingdom, there were pretty frequent occasions for this anticipated reign of the eldest prince. Such a regulation was not likely to diminish the mutual and almost inevitable jealousies between kings and Instances of their appeals fallen.

been the chief powers of the justiciary, ever since the commencement of that magistracy. And as the firma de derecho by the general privilege of the realm secures every man from being arrested or molested against reason and justice, so the manifestation, which is another principal and remedial right, takes place when any one is actually arrested without lawful process, and in such cases only the Justiciary of Aragon, when recourse is had to him, interposes by *manifestating* the person arrested, that is, by taking him into his own hands, out of the power of any judge, however high in authority, and this manifestation the justiciary or his deputies in his absence, are bound to issue at the same instant it is demanded without further inquiry, and it may be demanded by any one as attorney of the party requiring to be manifested."

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their heirs apparent, which have so often disturbed the tranquillity of a court and a nation. Peter IV. removed his eldest son, afterwards John I., from the lieutenancy of the kingdom. The prince entered into a firma del derecho before the justiciary, Dominic de Cerda, who, pronouncing in his favour, enjoined the king to replace his son in the lieutentancy as the undoubted right of the eldest born. Peter obeyed, not only in fact, to which, as Blancas observes, the law compelled him, but with apparent cheerfulness.* There are indeed no private persons, who have so strong an interest in maintaining a free constitution and the civil liberties of their countrymen, as the members of royal families; since none are so much exposed, in absolute governments, to the resentment and suspicion of a reigning monarch.

John I., who had experienced the protection of law in his weakness, had afterwards occasion to find it interposed against his power. This king had sent some citizens of Saragosa to prison without form of law. They applied to Juan de Cerda, the justiciary, for a manifestation. He issued his writ accordingly; nor, says Blancas, could he do otherwise, without being subject to a heavy fine. The king, pretending that the justiciary was partial, named one of his own judges, the vice-chancellor, as coadjutor. This raised a constitutional question, whether, on suspicion of partiality, a coadjutor to the justiciary could be appointed. The king sent a private order to the justiciary not

* Zurita, ubi supra. Blancas, p. 673.

to proceed to sentence upon this interlocutory point until he should receive instructions in the council, to which he was directed to repair. But he instantly pronounced sentence in favour of his exclusive jurisdiction without a coadjutor. He then repaired to the palace. Here the vice-chancellor, in a long harangue, enjoined him to suspend sentence till he had heard the decision of the council. Juan de Cerda answered that, the case being clear, he had already pronounced upon it. This produced some expressions of anger from the king, who began to enter into an argument on the merits of the question. But the justiciary answered that, with all deference to his majesty, he was bound to defend his conduct before the cortes, and not elsewhere. On a subsequent day, the king having drawn the justiciary to his country palace on pretence of hunting, renewed the conversation with the assistance of his ally the vice-chancellor; but no impression was made on the venerable magistrate, whom John at length, though much pressed by his advisers to violent courses, dismissed with civility. The king was probably misled throughout this transaction, which I have thought fit to draw from obscurity, not only in order to illustrate the privilege of manifestation, but as exhibiting an instance of judicial firmness and integrity, to which, in the fourteenth century, no country perhaps in Europe could offer a parallel.*

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* Blancæ Commentar. ubi supra. Zurita relates the story, but not so fully.

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Before the cortes of 1348, it seems as if the justiciary might have been displaced at the king's pleasure. From that time he held his station for life. But in order to evade this law, the king sometimes exacted a promise to resign upon request. Ximenes Cerdan, the justiciary in 1420, having refused to fulfil this engagement, Alfonso V. gave notice to all his subjects not to obey him, and notwithstanding the alarm which this encroachment created, eventually succeeded in compelling him to quit his office. In 1439, Alfonso insisted with still greater severity upon the execution of a promise to resign made by another justiciary, detaining him in prison until his death. But the cortes of 1442 proposed a law, to which the king reluctantly acceded, that the justiciary should not be compellable to resign his office on account of any previous engagement he might have made.*

Office of justiciary held for life.

But lest these high powers, imparted for the prevention of abuses, should themselves be abused, the justiciary was responsible, in case of an unjust sentence, to the extent of the injury inflicted;† and was also subjected, by a statute of 1390, to a court of inquiry, composed of four persons chosen by the king out of eight named by the cortes; whose office appears to have been that of examining and reporting to the four estates in cortes, by whom he was ultimately to be acquitted or

Responsibility of this magistrate.

* Fueros de Aragon, fol 22 Zurita, t. iii. fol. 240. 255 272 Banc Comitent. p. 701.

† Fueros de Aragon, fol 25.

condemned. This superintendence of the cortes, however, being thought dilatory and inconvenient, a court of seventeen persons was appointed in 1461, to hear complaints against the justiciary. Some alterations were afterwards made in this tribunal.* The justiciary was always a knight, chosen from the second order of nobility, the barons not being liable to personal punishment. He administered the coronation-oath to the king, and in the cortes of Aragon, the justiciary acted as a sort of royal commissioner, opening or proroguing the assembly by the king's direction.

Rights of legislation and taxation.

No laws could be enacted, or repealed, nor any tax imposed without the consent of the estates duly assembled.† Even as early as the reign of Peter II., in 1205, that prince having attempted to impose a general tallage, the nobility and commons united for the preservation of their franchises; and the tax was afterwards granted in part by the cortes.‡ It may easily be supposed that the Aragonese were not behind other nations in statutes

* Blancas Zurita, t. iii. f. 321 t. iv. f. 103. These regulations were very acceptable to the nation. In fact, the justiza of Aragon had possessed much more unlimited powers than ought to be entrusted to any single magistrate. The court of King's Bench in England, besides its consisting of four co-ordinate judges, is checked by the appellant jurisdictions of the Exchequer Chamber and House of Lords, and, still more importantly, by the rights of juries.

† Majores nostri, quæ de omnibus statuenda essent, noluerunt jubere, vetarive posse, nisi vocatis, descriptisque ordinibus, ac curiæ eorum adhibitis suffragiis, re ipsâ cognitâ et promulgatâ. Unde perpetuum illud nobis comparatum est jus, ut communes et publicæ leges neque tolli, neque rogari possint, nisi prius universus populus unâ voce comitiis institutis suum ea de re liberum suffragium ferat, idque postea ipsius regis assensu comprobetur. Blancæ, p. 761.

‡ Zurita, t. i. fol. 94.

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to secure these privileges, which upon the whole appear to have been more respected than in any other monarchy.* The general privilege of 1283 formed a sort of ground-work for this legislation, like the Great Charter in England. By a clause in this law, cortes were to be held every year at Saragosa. But under James II., their time of meeting was reduced to once in two years, and the place was left to the king's discretion.† Nor were the cortes of Aragon less vigilant than those of Castile in claiming a right to be consulted in all important deliberations of the executive power, or in remonstrating against abuses of government, or in superintending the proper expenditure of public money.‡ A variety of provisions, intended to

* Fueros de Aragon (Quod sisse in Aragonia removeantur, (A D 1372) De prohibitione sisarum. (1398) De conservatione patrimonii (1461) I have only remarked two instances of arbitrary taxation in Zurita's history, which is singularly full of information, one, in 1343, when Peter IV collected money from various cities, though not without opposition, and the other a remonstrance of the cortes in 1383 against heavy taxes, and it is not clear that this refers to general unauthorized taxation Zurita, t. ii f 168 and 382. Blancas mentions that Alfonso V set a tallage upon his towns for the marriage of his natural daughters, which he might have done, had they been legitimate; but they appealed to the justiciary's tribunal, and the king receded from his demand. p. 701.

Some instances of tyrannical conduct in violation of the constitutional laws occur, as will naturally be supposed, in the annals of Zurita. The execution of Bernard Cabrera under Peter IV, t ii f 336 and the severities inflicted on queen Forcia by her son-in-law John I, f 391 are perhaps as remarkable as any

† Zurita, t. i f 426 In general the session lasted from four to six months One assembly was prorogued from time to time, and continued six years, from 1446 to 1452, which was complained of as a violation of the law for their biennial renewal t iv. f 6.

‡ The Sicilian war of Peter III. was very unpopular, because it had been undertaken without consent of the barons, contrary to the practice of the kingdom; porque ningun negocio arduo empreendian, sin acuerdo y consejo de sus ricos-hombres. Zurita, t i fol 264. The cortes, he tells us, were usually divided into two parties, whigs and

secure these parliamentary privileges, and the civil liberties of the subject, will be found dispersed in the collection of Aragonese laws,* which may be favourably compared with those of our own statute-book.

Cortes of Aragon

Four estates, or, as they were called, arms (brazos), formed the cortes of Aragon; the prelates, and commanders of military orders, who passed for ecclesiastics;† the barons or ricoshombres; the equestrian order or infanzones, and the deputies of royal towns.‡ The two former had a right of appearing by proxy. There was no representation of the infanzones, or lower nobility. But it must be remembered that they were not numerous, nor was the kingdom large. Thirty-five are reckoned by Zurita as present in the cortes of 1395, and thirty-three in those of 1412; and as upon both

torios, estava ordinariamente dividida en dos partes, la una que pensava procurar el beneficio del reyno, y la otra que el servicio del rey." fol 321

* Fueros y observancias del reyno de Aragon 2 vols in fol Saragosa, 1667 The most important of these are collected by Blancas, p. 750

† It is said by some writers, that the ecclesiastical arm was not added to the cortes of Aragon till about the year 1300 But I do not find mention in Zurita of any such constitutional change at that time; and the prelates, as we might expect from the analogy of other countries, appear as members of the national council long before Queen Petronilla, in 1142, summoned a los perlados, ricoshombres, y cavalleros, y procuradores de las ciudades y villas, que le juntassen a cortes generales en la ciudad de Huesca Zurita, t i fol 71 So in the cortes of 1275, and on other occasions

‡ Popular representation was more ancient in Aragon than in any other monarchy The deputies of towns appear in the cortes of 1133, as Robertson has remarked from Zurita Hist of Charles V., note 32 And this cannot well be called in question, or treated as an anomaly, for we find them mentioned in 1142, (the passage cited in the last note,) and again in 1164, when Zurita enumerates many of their names fol 74 The institution of concejos, or corporate districts under a presiding town, prevailed in Aragon as it did in Castile.

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occasions an oath of fealty to a new monarch was to be taken, I presume that nearly all the nobility of the kingdom were present.* The riçoshombres do not seem to have exceeded twelve or fourteen in number. The ecclesiastical estate was not much, if at all, more numerous. A few principal towns alone sent deputies to the cortes; but their representation was very full; eight or ten, and sometimes more, sat for Saragosa, and no town appears to have had less than four representatives. During the interval of the cortes a permanent commission, varying a good deal as to numbers, but chosen out of the four estates, was empowered to sit with very considerable authority, receiving and managing the public revenue, and protecting the justiciary in his functions.†

Government of Valencia and Catalonia.

The kingdom of Valencia, and principality of Catalonia, having been annexed to Aragon, the one by conquest, the other by marriage, were always kept distinct from it in their laws and government. Each had its cortes, composed of three estates, for the division of the nobility into two orders did not exist in either country. The Catalans were tenacious of their ancient usages, and averse to incorporation with any other people of Spain. Their national character was high-spirited and independent; in no part of the peninsula did the territorial aristocracy retain, or at least pretend to such extensive privileges,‡ and the citizens

* Zurita, t. ii. f. 420.; t. iii. f. 76.

† Blancæ, p. 762. Zurita, t. iii. f. 76; f. 182. et alibi.

‡ Zurita, t. ii. f. 360. The villenage of the peasantry in some parts of Catalonia was very severe,

were justly proud of wealth acquired by industry, and of renown atchieved by valour. At the accession of Ferdinand I. which they had not much desired, the Catalans obliged him to swear three times successively to maintain their liberties, before they would take the reciprocal oath of allegiance.* For Valencia it seems to have been a politic design of James the Conqueror to establish a constitution nearly analogous to that of Aragon, but with such limitations as he should impose, taking care that the nobles of the two kingdoms should not acquire strength by union. In the reigns of Peter III. and Alfonso III., one of the principal objects contended for by the barons of Aragon was the establishment of their own laws in Valencia; to which the king never acceded.† They permitted however the possessions of the natives of Aragon in the latter kingdom to be governed by the law of Aragon.‡ These three states, Aragon, Valencia, and Catalonia were perpetually united by a law of Alfonso III.; and every king on his accession was bound to swear that he would never separate them.§ Sometimes general cortes of the kingdoms and principality were convened, but the members did not, even in this case, sit together, and were no otherwise united, than as they met in the same city.‖

even near the end of the fifteenth century, t. iv. f. 327.

* Zurita, t. iii. f. 81.

† Id. t. i. f. 281. 310. 333. There was originally a justiciary in the kingdom of Valencia, f. 281, but this, I believe, did not long continue.

‡ t. ii. f. 433.

§ t. ii. f. 91.

‖ Blancas Comment. p. 760. Zurita, t. iii. fol. 239.

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I do not mean to represent the actual condition of society in Aragon as equally excellent with the constitutional laws. Relatively to other monarchies, as I have already observed, there seem to have been fewer excesses of the royal prerogative in that kingdom. But the licentious habits of a feudal aristocracy prevailed very long. We find in history instances of private war between the great families, so as to disturb the peace of the whole nation, even near the close of the fifteenth century.* The right of avenging injuries by arms, and the ceremony of diffidation, or solemn defiance of an enemy, are preserved by the laws. We even meet with the ancient barbarous usage of paying a composition to the kindred of a murdered man.† The citizens of Saragosa were sometimes turbulent, and a refractory nobleman sometimes defied the ministers of justice. But owing to the remarkable copiousness of the principal Aragonese historian, we find more frequent details of this nature than in the scantier annals of some countries. The internal condition of society was certainly far from peaceable in other parts of Europe.

State of police.

Union of Castile and Aragon.

By the marriage of Ferdinand with Isabella, and by the death of John II. in 1479, the two ancient and rival kingdoms of Castile and Aragon were for ever consolidated in the monarchy of Spain. There had been some difficulty in adjusting the respective rights of the husband and wife over Castile. In

* Zurita, t. iv. fol. 189. † Fueros de Aragon, f. 166 &c.

the middle ages, it was customary for the more powerful sex to exercise all the rights which it derived from the weaker, as much in sovereignties as in private possessions. But the Castilians were determined to maintain the positive and distinct prerogatives of their queen, to which they attached the independence of their nation. A compromise therefore was concluded, by which, though, according to our notions, Ferdinand obtained more than a due share, he might consider himself as more strictly limited than his father had been in Navarre. The names of both were to appear jointly in their style, and upon the coin, the king's taking the precedence in respect of his sex. But, in the royal scutcheon, the arms of Castile were preferred on account of the kingdom's dignity. Isabella had the appointment of all civil offices in Castile; the nomination to spiritual benefices ran in the name of both. The government was to be conducted by the two conjointly when they were together, or by either singly, in the province where one or other might happen to reside.* This partition was well preserved throughout the life of Isabel without mutual encroachments or jealousies. So rare an unanimity between persons thus circumstanced must be attributed to the superior qualities of that princess, who, while she maintained a constant good understanding with a very

* Zurita, t. iv. fol. 224. Mariana, l. xxiv. c. 5.

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ambitious husband, never relaxed in the exercise of her paternal authority over the kingdoms of her ancestors.

Conquest of Granada.

Ferdinand and Isabella had no sooner quenched the flames of civil discord in Castile, than they determined to give an unequivocal proof to Europe of the vigour which the Spanish monarchy was to display under their government. For many years an armistice with the Moors of Granada had been uninterrupted. Neither John II. nor Henry IV. had been at leisure to think of aggressive hostilities; and the Moors themselves, a prey, like their Christian enemies, to civil war, and the feuds of their royal family, were content with the unmolested enjoyment of the finest province in the peninsula. If we may trust historians, the sovereigns of Granada were generally usurpers and tyrants. But I know not how to account for that vast populousness, that grandeur and magnificence which distinguished the Mohammedan kingdoms of Spain, without ascribing some measure of wisdom and beneficence to their governments. These southern provinces have dwindled in later times; and in fact Spain itself is chiefly interesting to most travellers, for the monuments which a foreign and odious race of conquerors have left behind them. Granada was however disturbed by a series of revolutions about the time of Ferdinand's accession, which naturally encouraged his designs. The Moors, contrary to what might have been expected from their relative strength, were the aggressors

by attacking a town in Andalusia.* Predatory incursions of this nature had hitherto been only retaliated by the Christians. But Ferdinand was conscious that his resources extended to the conquest of Granada, the consummation of a struggle protracted through nearly eight centuries. Even in the last stage of the Moorish dominion, exposed on every side to invasion, enfeebled by a civil dissension, that led one party to abet the common enemy, Granada was not subdued without ten years of sanguinary and unremitting contest. Fertile beyond all the rest of Spain, that kingdom contained seventy walled towns; and the capital is said, almost two centuries before, to have been peopled by 200,000 inhabitants.† Its resistance to such a force as that of Ferdinand is perhaps the best justification of the apparent negligence of earlier monarchs. But Granada was ultimately compelled to undergo the yoke. The city surrendered on the second of January 1492; an event glorious not only to Spain, but to Christendom; and which, in the political combat of the two religions, seemed almost to counterbalance the loss of Constantinople. It raised the name of Ferdinand, and of the new monarchy which he governed, to high estimation throughout Europe. Spain appeared an equal competitor with France in the lists of ambition. These great kingdoms had for some time felt the jealousy natural to emulous neighbours. The house of Aragon loudly complained

CHAP. IV. SPAIN. 1481

* Zurita, t. iv. fol. 314. † Id. ibid

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of the treacherous policy of Louis XI. He had fomented the troubles of Castile, and given not indeed an effectual aid, but all promises of support to the princess Joanna, the competitor of Isabel. Roussillon, a province belonging to Aragon, had been pledged to France by John II. for a sum of money. It would be tedious to relate the subsequent events, or to discuss their respective claims to its possession.* At the accession of Ferdinand, Louis XI. still held Rousillon, and shewed little intention to resign it. But Charles VIII., eager to smooth every impediment to his Italian expedition, restored the province to Ferdinand in 1493. Whether, by such a sacrifice, he was able to lull the king of Aragon into acquiescence, while he dethroned his relation at Naples, and alarmed for a moment all Italy with the apprehension of French dominion, it is not within the limits of the present work to inquire.

* For these transactions, see Garnier, Hist. de France, or Caillard, Rivalité de France et d'Espagne, t. iii. The latter is the most impartial French writer I have ever read, in matters where his own country is concerned.

CHAPTER V.

HISTORY OF GERMANY TO THE DIET OF WORMS IN 1495

Sketch of German History under the Emperors of the House of Saxony—House of Franconia—Henry IV.—House of Swabia—Frederic Barbarossa—Fall of Henry the Lion—Frederic II.—Extinction of House of Swabia—Changes in the Germanic Constitution—Electors—Territorial Sovereignty of the Princes—Rodolph of Hapsburgh—State of the Empire after his time—Causes of Decline of Imperial Power—House of Luxemburg—Charles IV.—Golden Bull—House of Austria—Frederic III.—Imperial Cities—Provincial States—Maximilian—Diet of Worms—Abolition of private Wars—Imperial Chamber—Aulic Council—Bohemia—Hungary—Switzerland.

After the deposition of Charles the Fat in 888, which finally severed the connexion between France and Germany,* Arnulf, an illegitimate descendant of Charlemagne, obtained the throne of the latter country, in which he was succeeded by

Separation of Germany from France.

* There can be no question about this in a general sense. But several German writers of the time assert, that both Rudes and Charles the Simple, rival kings of France, acknowledged the feudal superiority of Arnulf. "Charles, says Regino, regnum quod recuperavit ex manu ejus percepit." Struvius, Corpus Hist. Germ. p. 202, 208.

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his son Louis.* But upon the death of this prince in 911, the German branch of that dynasty became extinct. There remained indeed Charles the Simple, acknowledged as king in some parts of France, but rejected in others, and possessing no personal claims to respect. The Germans therefore wisely determined to chuse a sovereign from among themselves. They were at this time divided into five nations, each under its own duke, and distinguished by difference of laws, as well as of origin; the Franks, whose territory, comprizing Franconia and the modern Palatinate, was considered as the cradle of the empire, and who seem to have arrogated some superiority over the rest, the Swabians, the Bavarians, the Saxons, under which name the inhabitants of Lower Saxony alone and Westphalia were included, and the Lorrainers, who occupied the left bank of the Rhine as far as its termination. The choice of these nations in their general assembly fell upon Conrad, duke of Franconia, according to some writers, or at least a man of high rank, and descended through females from Charlemagne.†

Election of Conrad, 911

Conrad dying without male issue, the crown of Germany was bestowed upon Henry the Fowler, duke of Saxony, ancestor of the three Othos, who

House of Saxony. Henry the Fowler, 919

* The German princes had some hesitation about the choice of Louis; but their partiality to the Carlovingian line prevailed. Struvius, p. 208: quia reges Francorum semper ex uno genere processerunt, says an archbishop Hatto, in writing to the pope.

† Schmidt, Hist. des Allemands, t. ii. p. 388. Struvius, Corpus Historiæ Germanicæ, p 210. The former of these writers does not consider Conrad as duke of Franconia.

followed him in direct succession. To Henry, and to the first Otho, Germany was more indebted than to any sovereign since Charlemagne. The conquest of Italy, and recovery of the imperial title, are indeed the most brilliant trophies of Otho the Great; but he conferred far more unequivocal benefits upon his own country by completing what his father had begun, her liberation from the inroads of the Hungarians. Two marches, that of Misnia, erected by Henry the Fowler, and that of Austria, by Otho, were added to the Germanic territories by their victories.*

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GERMANY.

Otho I. 936
Otho II. 973
Otho III. 983.

A lineal succession of four descents without the least opposition, seems to shew that the Germans were disposed to consider their monarchy as fixed in the Saxon family. Otho II. and III. had been chosen each in his father's life time, and during infancy. The formality of election subsisted at that time in every European kingdom; and the imperfect rights of birth required a ratification by public assent. If at least France and England were hereditary monarchies in the tenth century, the same may surely be said of Germany; since we find the lineal succession fully as well observed in the last as in the former. But upon the

* Many towns in Germany, especially on the Saxon frontier, were built by Henry I.; who is said to have compelled every ninth man to take up his residence in them. This had a remarkable tendency to promote the improvement of that territory, and, combined with the discovery of the gold and silver mines of Goslar under Otho I., rendered it the richest and most important part of the empire. Struvius, p. 225. and 251. Schmidt, t. ii. p. 322. Putter, Historical Development of the German Constitution, vol. i. p. 115.

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Henry II. —1002.

immature and unexpected decease of Otho III., a momentary opposition was offered to Henry duke of Bavaria, *a collateral branch of the reigning family*. He obtained the crown, however, by what contemporary historians call an hereditary title,* and it was not until his death in 1024, that the house of Saxony was deemed to be extinguished.

House of Franconia. Conrad II. —1024. Henry III. —1039. Henry IV. —1056. Henry V. —1106.

No person had now any pretensions that could interfere with the unbiassed suffrages of the nation; and accordingly a general assembly was determined by merit to elect Conrad, sirnamed the Salic, a nobleman of Franconia.† From this prince sprang three successive emperors, Henry III., IV., and V. Perhaps the imperial prerogatives over that insubordinate confederacy never reached so high a point as in the reign of Henry III., the second emperor of the house of Franconia. It had been, as was natural, the object of all his predecessors not only to render their throne hereditary, which, in effect, the nation was willing to concede, but to surround it with authority sufficient to controul the leading vassals. These were the dukes of the four nations of Germany, Saxony, Bavaria, Swabia, and Franconia, and the three archbishops of the Rhenish cities, Mentz, Treves, and Cologne. Originally, as has

* A maximâ multitudine vox una respondit; Henricum, Christi adjutorio, et jure hereditario, regnatorum. Ditmar apud Struvium, p. 273. See other passages quoted in the same place. Schmidt, t. ii. p. 410

† Conrad was descended from a daughter of Otho the Great, and also from Conrad I. His first cousin was duke of Franconia. Struvius. Schmidt. Pfeffel.

been more fully shewn in another place, duchies, like counties, were temporary governments, bestowed at the pleasure of the crown. From this first stage they advanced to hereditary offices, and finally to patrimonial fiefs. But their progress was much slower in Germany than in France. Under the Saxon line of emperors, it appears probable, that although it was usual, and consonant to the prevailing notions of equity, to confer a duchy upon the nearest heir, yet no positive rule enforced this upon the emperor, and some instances of a contrary proceeding occurred.* But, if the royal prerogative in this respect stood higher than in France, there was a countervailing principle, that prohibited the emperor from uniting a fief to his domain, or even retaining one which he had possessed before his accession. Thus Otho the Great granted away his duchy of Saxony, and Henry II. that of Bavaria. Otho the Great endeavoured to counteract the effects of this custom, by conferring the duchies that fell into his hands upon members of his own family. This policy, though apparently well conceived, proved of no advantage to Otho; his son and brother having mixed in several rebellions against him. It was revived, however, by Conrad II. and Henry III. The latter was invested by his father with the two

* Schmidt, t. ii. p. 393. 403. Struvius, p. 214. supposes the hereditary rights of dukes to have commenced under Conrad I., but Schmidt is perhaps a better authority, and Struvius afterwards mentions the refusal of Otho I. to grant the duchy of Bavaria to the sons of the last duke, which, however, excited a rebellion p. 236

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duchies of Swabia and Bavaria. Upon his own accession, he retained the former for six years, and even the latter for a short time. The duchy of Franconia, which became vacant, he did not re-grant, but endeavoured to set a precedent of uniting fiefs to the domain. At another time, after sentence of forfeiture against the duke of Bavaria, he bestowed that great province on his wife, the empress Agnes.* He put an end altogether to the form of popular concurrence, which had been usual when the investiture of a duchy was conferred: and even deposed dukes by the sentence of a few princes, without the consent of the diet.† If we combine with these proofs of authority in the domestic administration of Henry III., his almost unlimited controul over papal elections, or rather the right of nomination that he acquired, we must consider him as the most absolute monarch in the annals of Germany.

Unfortunate reign of Henry IV.

These ambitious measures of Henry III. prepared fifty years of calamity for his son. It is easy to perceive that the misfortunes of Henry IV. were primarily occasioned by the jealousy with which repeated violations of their constitutional usages had inspired the nobility.‡ The mere circumstance of Henry IV.'s minority, under the guardianship of a woman, was enough to dis-

* Schmidt, t. iii. p. 25. Chron. Sax. ad ann. 1056.

† Id. p. 207.

‡ In the very first year of Henry's reign, while he was but six years old, the princes of Saxony are said by Lambert of Aschaffenburg to have formed a conspiracy to depose him, out of resentment for the injuries they had sustained from his father. Struvius, p. 306. St Marc, t. iii. p. 248.

sipate whatever power his father had acquired. Hanno, archbishop of Mentz, carried the young king away by force from his mother, and governed Germany in his name; till another archbishop, Adalbert of Bremen, obtained greater influence over him. Through the neglect of his education, Henry grew up with a character not well fitted to retrieve the mischief of so unprotected a minority; brave indeed, well-natured, and affable, but dissolute beyond measure, and addicted to low and debauched company. He was soon involved in a desperate war with the Saxons, a nation valuing itself on its populousness and riches, jealous of the house of Franconia, who wore a crown that had belonged to their own dukes, and indignant at Henry's conduct in erecting fortresses throughout their country. 1073

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In the progress of this war, many of the chief princes evinced an unwillingness to support the emperor.* Notwithstanding this, it would probably have terminated, as other rebellions had done, with no permanent loss to either party. But, in the middle of this contest, another far more memorable broke out with the Roman see, concerning ecclesiastical investitures. The motives of this famous quarrel will be explained in a different chapter of the present work. Its effect in Germany was ruinous to Henry. A sentence, not only of excommunication, but of deposition, which Gregory VII. pronounced against him, gave a pretence to 1077

* Struvius Schmidt

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all his enemies, secret as well as avowed, to withdraw their allegiance.* At the head of these was Rodolph, duke of Swabia, whom an assembly of revolted princes raised to the throne. We may perceive, in the conditions of Rodolph's election, a symptom of the real principle that animated the German aristocracy against Henry IV. It was agreed that the kingdom should no longer be hereditary, nor conferred on the son of a reigning monarch, unless his merit should challenge the popular approbation.† The pope strongly encouraged this plan of rendering the empire elective, by which he hoped either eventually to secure the nomination of its chief for the Holy See, or at least, by sowing the seed of civil dissensions in Germany, to render Italy more independent. Henry IV. however displayed greater abilities in his adversity, than his early conduct had promised.

1080 In the last of several decisive battles, Rodolph,

* A party had been already formed, who were meditating to depose Henry. His excommunication came just in time, to confirm their resolutions. It appears clearly, upon a little consideration of Henry IV.'s reign, that the ecclesiastical quarrel was only secondary in the eyes of Germany. The contest against him was a struggle of the aristocracy, jealous of the imperial prerogatives which Conrad II. and Henry III. had strained to the utmost. Those who were in rebellion against Henry were not pleased with Gregory VII. Bruno, author of a history of the Saxon war, a furious invective, manifests great dissatisfaction with the court of Rome, which he reproaches with dissimulation and venality.

† Hoc etiam ibi consensu communi comprobatum, Romani pontificis auctoritate est corroboratum, ut regia potestas nulli per hæreditatem, sicut antea fuit consuetudo, cederet, sed filius regis, etiamsi valde dignus esset, per electionem spontaneam, non per successionis lineam, rex proveniret: si vero non esset dignus regis filius, vel si nollet eum populus, quem regem facere vellet, haberet in potestate populus. Bruno de Bello Saxonico, apud Struvium, p. 327.

though victorious, was mortally wounded and no one cared to take up a gauntlet which was to be won with so much trouble and uncertainty. The Germans were sufficiently disposed to submit; but Rome persevered in her unrelenting hatred. At the close of Henry's long reign, she excited against him his eldest son, and after more than thirty years of hostility, had the satisfaction of wearing him down with misfortune, and casting out his body, as excommunicated, from its sepulchre.

Extinction of the house of Franconia. Election of Lothaire. 1125

In the reign of his son Henry V. there is no event worthy of much attention, except the termination of the great contest about investitures. At his death in 1125, the male line of the Franconian emperors was at an end. Frederic, duke of Swabia, grandson by his mother of Henry IV., had inherited their patrimonial estates, and seemed to represent their dynasty. But both the last emperors had so many enemies, and a disposition to render the crown elective prevailed so strongly among the leading princes, that Lothaire, duke of Saxony, was elevated to the throne, though rather in a tumultuous and irregular manner.* Lothaire, who had been engaged in a revolt against Henry

* See an account of Lothaire's election by a contemporary writer, in Struvius, p. 357. See also proofs of the dissatisfaction of the aristocracy at the Franconian government. Schmidt, t. iii. p. 328. It was evidently their determination to render the empire truly elective (Id. p. 335) and perhaps we may date that fundamental principle of the Germanic constitution from the accession of Lothaire. Previously to that era, birth seems to have given not only a fair title to preference, but a sort of inchoate right, as in France, Spain, and England. Lothaire signed a capitulation at his accession.

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V. and the chief of a nation that bore an inveterate hatred to the house of Franconia, was the natural enemy of the new family that derived its importance and pretensions from that stock. It was the object of his reign, accordingly, to oppress the two brothers, Frederic and Conrad, of the Hohenstauffen or Swabian family. By this means he expected to secure the succession of the empire for his son-in-law. Henry, sirnamed the Proud, who married Lothaire's only child, was fourth in descent from Welf, son of Azon, marquis of Este, by Cunegonda, heiress of a distinguished family, the Welfs of Altorf in Swabia. Her son was invested with the duchy of Bavaria in 1071. His descendant, Henry the Proud, represented also, through his mother, the ancient dukes of Saxony, sirnamed Billung, from whom he derived the duchy of Luneburg. The wife of Lothaire transmitted to her daughter the patrimony of Henry the Fowler, consisting of Hanover and Brunswic. Besides this great dowry, Lothaire bestowed upon his son-in-law the duchy of Saxony, in addition to that of Bavaria.*

This amazing preponderance, however, tended to alienate the princes of Germany from Lothaire's views in favour of Henry; and the latter does not seem to have possessed abilities adequate to his eminent station. On the death of Lothaire in

* Pfeffel, Abrégé Chronologique de l'Histoire d'Allemagne, t. 1 p. 269. (Paris, 1777.) Gibbon's Antiquities of the House of Brunswic.

1138, the partizans of the house of Swabia made a hasty and irregular election of Conrad, in which the Saxon faction found itself obliged to acquiesce.* The new emperor availed himself of the jealousy which Henry the Proud's aggrandizement had excited. Under pretence that two duchies could not legally be held by the same person, Henry was summoned to resign one of them; and, on his refusal, the diet pronounced that he had incurred a forfeiture of both. Henry made but little resistance, and, before his death, which happened soon afterwards, saw himself stripped of all his hereditary as well as acquired possessions. Upon this occasion, the famous names of Guelf and Ghibelin were first heard, which were destined to keep alive the flame of civil dissension in far distant countries, and after their meaning had been forgotten. The Guelfs or Welfs were, as I have said, the ancestors of Henry, and the name has become a sort of patronymic in his family. The word Ghibelin is derived from Wibelung, a town in Franconia, whence the emperors of that line are said to have sprung. The house of Swabia were considered in Germany as representing that of Franconia; as the Guelfs may, without much impropriety, be deemed to represent the Saxon line.†

House of Swabia. Conrad III. 1138

Original of Guelfs and Ghibelins

Though Conrad III. left a son, the choice of the electors fell, at his own request, upon his nephew Frederic Barbarossa.‡ The most conspicuous events of this great emperor's life belong

* Schmidt
† Struvius, pp. 370 and 378
‡ Struvius

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to the history of Italy. At home he was feared and respected; the imperial prerogatives stood as high during his reign, as, after their previous decline, it was possible for a single man to carry them.* But the only circumstance which appears memorable enough for the present sketch, is the second fall of the Guelfs. Henry the Lion, son of Henry the Proud, had been restored by Conrad III. to his father's duchy of Saxony, resigning his claim to that of Bavaria, which had been conferred on the margrave of Austria. This renunciation, which indeed was only made in his name during childhood, did not prevent him from urging the emperor Frederic to restore the whole of his birthright; and Frederic, his first cousin, whose life he had saved in a sedition at Rome, was induced to comply with this request in 11[illegible]. Far from evincing that political jealousy wh[illegible] some writers impute to him, the emperor seems to have carried his generosity beyond the limits of prudence. For many years their union was apparently cordial. But, whether it was that Henry took umbrage at part of Frederic's conduct,† or that mere ambition rendered him ungrateful, he certainly abandoned his sovereign in a moment of distress, refusing to give any assistance in that expedition into Lombardy, which ended in the unsuccessful battle of Legnano. Frederic could

Fall of Henry the Lion.

1178

* Pfeffel, p. 341

† Frederic had obtained the succession of Welf, marquis of Tuscany, uncle of Henry the Lion, who probably considered himself as intitled to expect it.—Schmidt, p. 427.

not forgive this injury; and taking advantage of complaints which Henry's power and haughtiness had produced, summoned him to answer charges in a general diet. The duke refused to appear, and being adjudged contumacious, a sentence of confiscation, similar to that which ruined his father, fell upon his head; and the vast imperial fiefs that he possessed were shared among some potent enemies.* He made an ineffectual resistance; like his father, he appears to have owed more to fortune than to nature; and, after three years exile, was obliged to remain content with the restoration of his alodial estates in Saxony. These, fifty years afterwards, were converted into imperial fiefs, and became the two duchies of the house of Brunswic, the lineal representatives of Henry the Lion, and inheritors of the name of Guelf.†

Notwithstanding the prevailing spirit of the German oligarchy, Frederic Barbarossa had found no difficulty in procuring the election of his son Henry, even during infancy, as his successor.‡ The fall of Henry the Lion had greatly weakened the ducal authority in Saxony and Bavaria; the

Hen

* Putter, in his Historical Development of the Constitution of the German Empire, is inclined to consider Henry the Lion as sacrificed to the emperor's jealousy of the Guelfs, and as illegally proscribed by the diet. But the provocations he had given Frederic are undeniable; and, without pretending to decide on a question of German history, I do not see that there was any precipitancy or manifest breach of justice in the course of proceedings against him. Schmidt, Pfeffel, and Struvius do not represent the condemnation of Henry as unjust.

† Putter, p. 220.

‡ Struvius, p. 418.

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princes who acquired that title, especially in the former country, finding that the secular and spiritual nobility of the first class had taken the opportunity to raise themselves into an immediate dependence upon the empire. Henry VI. came, therefore, to the crown with considerable advantages in respect of prerogative; and these inspired him with a bold scheme of declaring the empire hereditary. One is more surprized to find that he had no contemptible prospect of success in this attempt; fifty-two princes, and even, what appears hardly credible, the See of Rome under Clement III. having been induced to concur in it. But the Saxons made so vigorous an opposition, that Henry did not think it advisable to persevere.* He procured, however, the election of his son Frederic, an infant only two years old. But, the emperor dying almost immediately, a powerful body of princes, supported by Pope Innocent III., were desirous to withdraw their consent.

Philip and Otho IV.

1197

Philip duke of Swabia, the late king's brother, unable to secure his nephew's succession, brought about his own election by one party, while another chose Otho of Brunswic, younger son of Henry the Lion. This double election renewed the rivalry between the Guelfs and Ghibelins, and threw Germany into confusion for several years. Philip, whose pretensions appear to be the more

* Struvius, p. 424 Impetravit a subditis, ut, cessante pristinâ Palatinorum electione, imperium in ipsius posteritatem, distinctâ proximorum successione, transiret, et sic in ipso terminus esset electionis, principumque successivæ dignitatis. Gervas. Tilburiens. ibidem.

legitimate of the two, gained ground upon his adversary, notwithstanding the opposition of the pope, till he was assassinated, in consequence of a private resentment. Otho IV. reaped the benefit of a crime in which he did not participate; and became for some years undisputed sovereign. But, having offended the pope by not entirely abandoning his imperial rights over Italy, he had, in the latter part of his reign, to contend against Frederic, son of Henry VI. who having grown up to manhood, came into Germany as heir of the house of Swabia, and, what was not very usual in his own history, or that of his family, the favoured candidate of the Holy See. Otho IV. had been almost entirely deserted, except by his natural subjects, when his death, in 1218, removed every difficulty, and left Frederic II. in the peaceable possession of Germany. 1208

Frederic II

The eventful life of Frederic II. was chiefly passed in Italy. To preserve his hereditary dominions, and chastise the Lombard cities, were the leading objects of his political and military career. He paid therefore but little attention to Germany, from which it was in vain for any emperor to expect effectual assistance towards objects of his own. Careless of prerogatives which it seemed hardly worth an effort to preserve, he sanctioned the independence of the princes, which may be properly dated from his reign. In return, they readily elected his son Henry king of the Romans; and, on his being implicated in a rebellion, deposed him with equal readiness, and

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substituted his brother Conrad at the emperor's request.* But in the latter part of Frederic's reign, the deadly hatred of Rome penetrated beyond the Alps. After his solemn deposition in the council of Lyons, he was incapable, in ecclesiastical eyes, of holding the imperial sceptre. Innocent IV. found however some difficulty in setting up a rival emperor. Henry, landgrave of Thuringia, made an indifferent figure in this character. Upon his death, William, Count of Holland, was chosen by the party adverse to Frederic and his son Conrad; and, after the emperor's death, he had some success against the latter. It is hard indeed to say that any one was actually sovereign for twenty-two years that followed the death of Frederic II.; a period of contested title and universal anarchy, which is usually denominated the grand interregnum. On the decease of William of Holland, in 1256, a schism among the electors produced the double choice of Richard earl of Cornwall, and Alfonso X. king of Castile. It seems not easy to determine which of these candidates had a legal majority of votes,† but the

Consequences of the Council of Lyons.

1245

1248

Grand interregnum.

1250—1272

Richard of Cornwall.

* Struvius, p. 457.

† The election ought legally to have been made at Frankfort. But the elector of Treves, having got possession of the town, shut out the archbishops of Mentz and Cologne, and the count Palatine, on pretence of apprehending violence. They met under the walls, and there elected Richard. Afterwards Alfonso was chosen by the votes of Treves, Saxony and Brandenburg. Historians differ about the vote of Ottocar, king of Bohemia, which would turn the scale. Some time after the election, it is certain that he was on the side of Richard. Perhaps we may collect from the opposite statement in Struvius, p. 504. that the proxies of Ottocar had voted for Alfonso, and that he did not think fit to recognize their act.

There can be no doubt that Richard was *de facto* sovereign of Germany; and it is singular, that

subsequent recognition of almost all Germany, and a sort of possession evidenced by public acts, which have been held valid, as well as the general consent of contemporaries, may justify us in adding Richard to the imperial list. The choice indeed was ridiculous, as he possessed no talents which could compensate for his want of power; but the electors attained their objects; to perpetuate a state of confusion by which their own independence was consolidated, and to plunder without scruple a man, like Didius at Rome, rich and foolish enough to purchase the first place upon earth.

State of the Germanic constitution.

That place indeed was now become a mockery of greatness. For more than two centuries, notwithstanding the temporary influence of Frederic Barbarossa and his son, the imperial authority had been in a state of gradual decay. From the time of Frederic II. it had bordered upon absolute insignificance; and the more prudent German princes were slow to canvass for a dignity so little accompanied by respect. The changes wrought in the Germanic constitution during the period of the Swabian emperors chiefly consist in the establishment of an oligarchy of electors, and of the territorial sovereignty of the princes.

Electors.

1. At the extinction of the Franconian line by the death of Henry V., it was determined by the

Struvius should assert the contrary, on the authority of an instrument of Rodolph, which expressly designates him king, per quondam Richardum regem illustrem. Struv p. 502.

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German nobility to make their empire practically elective, admitting no right, or even natural pretension, in the eldest son of a reigning sovereign. Their choice on former occasions had been made by free and general suffrage. But it may be presumed, that each nation voted unanimously, and according to the disposition of its duke. It is probable too, that the leaders, after discussing in previous deliberations the merits of the several candidates, submitted their own resolutions to the assembly, which would generally concur in them without hesitation. At the election of Lothaire, in 1124, we find an evident instance of this previous choice, or as it was called, *prætaxation*, from which the electoral college of Germany has been derived. The princes, it is said, trusted the choice of an emperor to ten persons, in whose judgement they promised to acquiesce.* This precedent was, in all likelihood, followed at all subsequent elections. The proofs indeed are not perfectly clear. But in the famous privilege of Austria, granted by Frederic I. in 1156, he bestows a rank upon the newly-created duke of that country, immediately after the electing princes (post principes electores);† a strong presumption that the right of prætaxation was not only established, but limited to a few definite persons. In a letter of Innocent III., concerning the double election of Philip and Otho in 1198, he asserts the

* Struv. p. 357. Schmidt, t. iii. 331

† Schmidt, t. iii p. 390

latter to have had a majority in his favour of those, to whom the right of election chiefly belongs (ad quos principaliter spectat electio).* And a law of Otho in 1208, if it be genuine, appears to fix the exclusive privilege of the seven electors.† Nevertheless so obscure is this important part of the Germanic system, that we find four ecclesiastical and two secular princes concurring with the regular electors in the act, as reported by a contemporary writer, that creates Conrad, son of Frederic II., king of the Romans.‡ This, however, may have been an irregular deviation from the principle already established. But it is admitted, that all the princes retained, at least during the twelfth century, their consenting suffrage; like the laity in an episcopal election, whose approbation continued to be necessary, long after the real power of choice had been withdrawn from them.§

It is not easy to account for all the circumstances, that gave to seven spiritual and temporal princes this distinguished pre-eminence. The three archbishops, Mentz, Treves, and Cologne, were always indeed at the head of the German church. But the secular electors should naturally have been the dukes of four nations, Saxony, Franconia, Swabia, and Bavaria. We find, how-

* Pfeffel, p. 360.

† Schmidt, t. iv. p. 80.

‡ This is not mentioned in Struvius, or the other German writers. But Denina (Rivoluzioni d'Italia, l. ix. c. 9.) quotes the style of the act of election from the Chronicle of Francis Pippin.

§ This is manifest by the various passages relating to the elections of Philip and Otho, quoted by Struvius, p. 428. 430. See too Pfeffel, ubi supra. Schmidt, t. iv. p. 79.

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ever, only the first of these in the undisputed exercise of a vote. It seems probable, that, when the electoral princes came to be distinguished from the rest, their privilege was considered as peculiarly connected with the discharge of one of the great offices in the imperial court. These were attached, as early as the diet of Mentz in 1184, to the four electors, who ever afterwards possessed them: the duke of Saxony having then officiated as arch-marshal, the count-palatine of the Rhine as arch-steward, the king of Bohemia as arch-cup-bearer, and the margrave of Brandenburg as arch-chamberlain of the empire.* But it still continues a problem, why the three latter offices, with the electoral capacity as their incident, should not rather have been granted to the dukes of Franconia, Swabia, and Bavaria. I have seen no adequate explanation of this circumstance; which may perhaps lead us to presume, that the right of pre-election was not quite so soon confined to the precise number of seven princes. The final extinction of two great original duchies, Franconia and Swabia, in the thirteenth century, left the electoral rights of the count palatine and the margrave of Brandenburg beyond dispute. But the dukes of Bavaria continued to claim a vote in opposition to the kings of Bohemia. At the election of Rodolph in 1272, the two brothers of the house of Wittelsbach voted separately, as count Palatine, and duke of Lower Bavaria. Ottocar

* Schmidt, t. iv. p. 78

was excluded upon this occasion; and it was not till 1290 that the suffrage of Bohemia was fully recognized. The Palatine and Bavarian branches, however, continued to enjoy their family vote conjointly, by a determination of Rodolph; upon which Louis of Bavaria slightly innovated, by rendering the suffrage alternate. But the Golden Bull of Charles IV. put an end to all doubts on the rights of electoral houses, and absolutely excluded Bavaria from voting. The limitation to seven electors, first perhaps fixed by accident, came to be invested with a sort of mysterious importance, and certainly was considered, until times comparatively recent, as a fundamental law of the empire.*

Princes and untitled inferior nobility

2. It might appear natural to expect that an oligarchy of seven persons, who had thus excluded their equals from all share in the election of a sovereign, would assume still greater authority, and trespass farther upon the less powerful vassals of the empire. But while the electors were establishing their peculiar privilege, the class immediately inferior raised itself by important acquisitions of power. The German dukes, even after they became hereditary, did not succeed in compelling the chief nobility within their limits to hold their lands in fief, so completely as the peers of France had done. The nobles of Swabia refused to follow their duke into the field against the emperor Conrad II.† Of this aristocracy the

* Schmidt, t. iv p. 78. 568 Pfeffel, p. 435. Putter, p. 274. 563. Struvius, p. 511.

† Pfeffel, p. 209

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superior class were denominated princes; an appellation which, after the eleventh century, distinguished them from the untitled nobility, most of whom were their vassals. They were constituent parts of all diets, and though gradually deprived of their original participation in electing an emperor, possessed, in all other respects, the same rights as the dukes, or electors. Some of them were fully equal to the electors, in birth as well as extent of dominions; such as the princely houses of Austria, Hesse, Brunswic and Misnia. By the division of Henry the Lion's vast territories,* and by the absolute extinction of the Swabian family in the following century, a great many princes acquired additional weight. Of the ancient duchies, only Saxony and Bavaria remained; the former of which especially was so dismembered, that it was vain to attempt any renewal of the ducal jurisdiction. That of the emperor, formerly exercised by the counts palatine, went almost equally into disuse, during the contest between Philip and Otho IV. The princes accordingly had acted with sovereign independence within their own fiefs, before the reign of Frederic II.; but the legal recognition of their immunities was reserved for two edicts of that emperor; one, in 1220, relating to ecclesiastical, and the other, in 1232, to secular princes. By these he engaged neither to levy the customary imperial dues, nor

* See the arrangements made in consequence of Henry's forfeiture, which gave quite a new face to Germany, in Pfeffel, p. 234. also p. 437.

to permit the jurisdiction of the palatine judges, within the limits of a state of the empire;* concessions, that amounted to little less than an abdication of his own sovereignty. From this epoch the territorial independence of the states may be dated.

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A class of titled nobility, inferior to the princes, were the counts of the empire, who seem to have been separated from the former in the twelfth century, and to have lost at the same time their right of voting in the diets † In some parts of Germany, chiefly in Franconia and upon the Rhine, there always existed a very numerous body of lower nobility, untitled, at least till modern times, but subject to no superior except the emperor. These are supposed to have become *immediate*, after the destruction of the house of Swabia, within whose duchies they had been comprehended ‡

A short interval elapsed after the death of Richard of Cornwall, before the electors could be induced, by the deplorable state of confusion into which Germany had fallen, to fill the imperial throne. Their choice was however the best that could have been made. It fell upon Rodolph count of Hapsburg, a prince of very ancient family, and of considerable possessions as well in

Election of Rodolph of Hapsburg. 1272

* Pfeffel, p 384 Putter, p 233

† In the instruments relating to the election of Otho IV the princes sign their names, Ego N elegi et subscripsi But the counts only as follows Ego N consensi et subscripsi. Pfeffel, p 360

‡ Pfeffel, p 445 Putter, p. 254 Struvius, p 511

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Switzerland as upon each bank of the Upper Rhine, but not sufficiently powerful to alarm the electoral oligarchy. Rodolph was brave, active, and just; but his characteristic quality appears to have been good sense, and judgement of the circumstances in which he was placed. Of this he gave a signal proof in relinquishing the favourite project of so many preceding emperors, and leaving Italy altogether to itself. At home he manifested a vigilant spirit in administering justice, and is said to have destroyed seventy strong holds of noble robbers in Thuringia and other parts, bringing many of the criminals to capital punishment.* But he wisely avoided giving offence to the more powerful princes; and during his reign, there were hardly any rebellions in Germany.

Investment of his son Albert with duchy of Austria.

It was a very reasonable object of every emperor to aggrandize his family by investing his near kindred with vacant fiefs; but no one was so fortunate in his opportunities as Rodolph. At his accession, Austria, Styria, and Carniola were in the hands of Ottocar, King of Bohemia. These extensive and fertile countries had been formed into a march or margraviate, after the victories of Otho the Great over the Hungarians. Frederic Barbarossa erected them into a duchy, with many distinguished privileges, especially that of female succession, hitherto unknown in the feudal princi-

* Struvius, p 530 Coxe's Hist. of House of Austria, p 57 This valuable work contains a full and interesting account of Rodolph's reign.

palities of Germany.* Upon the extinction of the house of Bamberg, which had enjoyed this duchy, it was granted by Frederic II. to a cousin of his own name; after whose death a disputed succession gave rise to several changes, and ultimately enabled Ottocar to gain possession of the country. Against this king of Bohemia Rodolph waged two successful wars, and recovered the Austrian provinces, which, as vacant fiefs, he conferred, with the consent of the diet, upon his son Albert.† 1283

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Notwithstanding the merit and popularity of Rodolph, the electors refused to chuse his son king of the Romans in his life-time; and, after his death, determined to avoid the appearance of hereditary succession, put Adolphus of Nassau upon the throne. There is very little to attract notice in the domestic history of the empire during the next two centuries. From Adolphus to

State of the empire after Rodolph

Adolphus 1292
Albert I 1298
Henry VII 1308
Louis IV. 1314

* The privileges of Austria were granted to the margrave Henry in 1156, by way of indemnity for his restitution of Bavaria to Henry the Lion. The territory between the Inn and the Ems was separated from the latter province, and annexed to Austria at this time. The dukes of Austria are declared equal in rank to the palatine archdukes (archi-ducibus palatinis). This expression gave a hint to the duke Rodolph IV. to assume the title of archduke of Austria. Schmidt, iii. p. 390. Frederic II. even created the duke of Austria king: a very curious fact, though neither he nor his successors ever assumed the title. Struvius, p. 463. The instrument runs as follows: Dignatus Austriæ et Styriæ, cum pertinentiis et terminis suis quot hactenus habuit, ad nomen et honorem regium transferentes, te hactenus ducatuum prædictorum ducem, de potestatis nostræ plenitudine et magnificentia specialis promovemus in regem, per libertates et jura prædictum regnum tuum præsentis epigrammatis auctoritate donantes, quæ regiam decent dignitatem: ut tamen ex honore quem tibi libenter addimus, nihil honoris et juris nostri diademati aut imperii subtrahatur.

† Struvius, p. 525. Schmidt. Coxe.

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Charles IV. 1347. Wenceslaus 1378 Robert, 1400. Sigismund, 1414.

Sigismund, every emperor had either to struggle against a competitor, claiming the majority of votes at his election, or against a combination of the electors to dethrone him. The imperial authority became more and more ineffective; yet it was frequently made a subject of reproach against the emperors, that they did not maintain a sovereignty to which no one was disposed to submit.

It may appear surprizing, that the Germanic confederacy under the nominal supremacy of an emperor should have been preserved in circumstances apparently so calculated to dissolve it. But, besides the natural effect of prejudice and a famous name there were sufficient reasons to induce the electors to preserve a form of government in which they bore so decided a sway. Accident had in a considerable degree restricted the electoral suffiages to seven princes. Without the college, there were houses more substantially powerful than any within it. The duchy of Saxony had been subdivided by repeated partitions among children, till the electoral right was vested in a prince who possessed only the small territory of Wittenberg. The great families of Austria, Bavaria, and Luxemburg, though not electoral, were the real heads of the German body; and though the two former lost much of their influence for a time through the pernicious custom of partition, the empire seldom looked for its head to any other house than one of these three.

While the duchies and counties of Germany re-

tained their original character of offices or governments, they were of course, even though considered as hereditary, not subject to partition among children. When they acquired the nature of fiefs, it was still consonant to the principles of a feudal tenure, that the eldest son should inherit according to the law of primogeniture; an inferior provision or apanage, at most, being reserved for the younger children. The law of England favoured the eldest exclusively; that of France gave him great advantages. But in Germany a different rule began to prevail about the thirteenth century.* An equal partition of the inheritance without the least regard to priority of birth, was the general law of its principalities. Sometimes this was effected by undivided possession, or tenancy in common, the brothers residing together, and reigning jointly. This tended to preserve the integrity of dominion, but as it was frequently incommodious, a more usual practice was to divide the territory. From such partitions are derived those numerous independent principalities of the same house, many of which still subsist in Germany. In 1589, there were eight reigning princes of the Palatine family; and fourteen, in 1675, of that of Saxony.† Originally, these partitions were in general absolute and with-

* Schmidt, t. iv p. 60. Pfeffel, p. 289. maintains that partitions were not introduced till the latter end of the thirteenth century. This may be true, as a general rule; but I find the house of Baden divided into two branches, Baden and Hochberg, in 1190, with rights of mutual reversion.

† Pfeffel, ibid. Putter, p. 180.

out reversion; but, as their effect in weakening families became evident, a practice was introduced of making compacts of reciprocal succession, by which a fief was prevented from escheating to the empire, until all the male posterity of the first feudatary should be extinct. Thus, while the German empire survived, all the princes of Hesse or of Saxony had reciprocal contingencies of succession, or what our lawyers call cross-remainders, to each other's dominions. A different system was gradually adopted.* By the Golden Bull of Charles IV. the electoral territory, that is, the particular district to which the electoral suffrage was inseparably attached, became incapable of partition, and was to descend to the eldest son. In the fifteenth century, the present house of Brandenburg set the first example of establishing primogeniture by law; the principalities of Anspach and Bayreuth were dismembered from it for the benefit of younger branches; but it was declared that all the other dominions of the family should for the future belong exclusively to the reigning elector. This politic measure was adopted in several other families; but, even in the sixteenth century, the prejudice was not removed, and some German princes denounced curses on their posterity, if they should introduce the impious custom of primogeniture.*

Weakened by these subdivisions, the principalities of Germany in the fourteenth and fifteenth centuries shrink to a more and more diminutive

* Putter, p. 280.

size in the scale of nations. But one family, the most illustrious of the former age, was less exposed to this enfeebling system. Henry VII. count of Luxemburg, a man of much more personal merit than hereditary importance, was elevated to the empire in 1308. Most part of his short reign he passed in Italy; but he had a fortunate opportunity of obtaining the crown of Bohemia for his son. John King of Bohemia did not himself wear the imperial crown; but three of his descendants possessed it, with less interruption than could have been expected. His son Charles IV. succeeded Louis of Bavaria in 1347; not indeed without opposition, for a double election and a civil war were matters of course in Germany. Charles IV. has been treated with more derision by his contemporaries, and consequently by later writers, than almost any prince in history; yet he was remarkably successful in the only objects that he seriously pursued. Deficient in personal courage, insensible of humiliation, bending without shame to the pope, to the Italians, to the electors, so poor and so little reverenced as to be arrested by a butcher at Worms for want of paying his demand, Charles IV. affords a proof that a certain dexterity and cold-blooded perseverance may occasionally supply, in a sovereign, the want of more respectable qualities. He has been reproached with neglecting the empire. But he never designed to trouble himself about the empire, except for his private ends. He did not neglect the kingdom of Bohemia, to which he almost seemed to render

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Germany a province. Bohemia had been long considered as a fief of the empire, and indeed could pretend to an electoral vote by no other title. Charles, however, gave the states by law the right of chusing a king, on the extinction of the royal family, which seems derogatory to the imperial prerogative.* It was much more material that, upon acquiring Brandenburg, partly by conquest, and partly by a compact of succession in 1373, he not only invested his sons with it, which was conformable to usage, but annexed that electorate for ever to the kingdom of Bohemia.† He constantly resided at Prague, where he founded a celebrated university, and embellished the city with buildings. This kingdom, augmented also during his reign by the acquisition of Silesia, he bequeathed to his son Wenceslaus, for whom, by pliancy towards the electors and the court of Rome, he had procured, against all recent example, the imperial succession.‡

Golden Bull. 1355

The reign of Charles IV. is distinguished in the constitutional history of the empire, by his Golden Bull, an instrument which finally ascertained the prerogatives of the electoral college. The Golden Bull terminated the disputes which had arisen between different members of the same house as to their right of suffrage, which was declared inherent in certain definite territories. The number was absolutely restrained to seven. The

* Struvius, p. 641.
† Pfeffel, p. 575. Schmidt, t. iv. p. 595.
‡ Struvius, p. 637.

place of legal imperial election was fixed at Frankfort; of coronations, at Aix-la-Chapelle; and the latter ceremony was to be performed by the archbishop of Cologne. These regulations, though consonant to ancient usage, had not always been observed, and their neglect had sometimes excited questions as to the validity of elections. The dignity of elector was enhanced by the Golden Bull as highly as an imperial edict could carry it; they were declared equal to kings, and conspiracy against their persons incurred the penalty of high treason.* Many other privileges are granted to render them more completely sovereign within their dominions. It seems extraordinary that Charles should have voluntarily elevated an oligarchy, from whose pretensions his predecessors had frequently suffered injury. But he had more to apprehend from the two great families of Bavaria and Austria, whom he relatively depressed by giving such a preponderance to the seven electors, than from any members of the college. By this compact with Brandenburg, he had a fair prospect of adding a second vote to his own; and there was more room for intrigue and management, which Charles always preferred to arms, with a small number, than with the whole body of princes.

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The next reign, nevertheless, evinced the dan- E

* Pfeffel, p. 565. Putter, p. 271. Schmidt, t. iv. p. 566. The Golden Bull not only fixed the Palatine vote, in absolute exclusion of Bavaria, but settled a controversy of long standing between the two branches of the house of Saxony, Wittenberg and Lauenburg, in favour of the former.

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Wenceslaus.

ger of investing the electors with such preponderating authority. Wenceslaus, a supine and voluptuous man, less respected, and more negligent of Germany, if possible, than his father, was regularly deposed by a majority of the electoral college in 1400. This right, if it is to be considered as a right, they had already used against Adolphus of Nassau in 1298, and against Louis of Bavaria in 1346. They chose Robert Count Palatine instead of Wenceslaus; and though the latter did not cease to have some adherents, Robert has generally been counted among the lawful emperors.* Upon his death, the empire returned to the house of Luxemburg; Wenceslaus himself waving his rights in favour of his brother Sigismund, king of Hungary.†

House of Austria.

The house of Austria had hitherto given but two emperors to Germany, Rodolph its founder, and his son Albert, whom a successful rebellion elevated in the place of Adolphus. Upon the death of Henry of Luxemburg, in 1313, Frederic, son of Albert, disputed the election of Louis duke of Bavaria, alledging a majority of genuine votes. This produced a civil war, in which the Austrian

* Many of the cities, besides some princes, continued to recognize Wenceslaus throughout the life of Robert, and the latter was so much considered as an usurper by foreign states, that his ambassadors were refused admittance at the council of Pisa Struvius, p. 658.

† This election of Sigismund was not uncontested Josse, or Jodocus, margrave of Moravia, having been chosen, as far as appears, by a legal majority. However, his death within three months removed the difficulty; and Josse, who was not crowned at Frankfort, has never been reckoned among the emperors, though modern critics agree that his title was legitimate. Struv p. 684. Pfeffel, p 612.

party were entirely worsted. Though they advanced no pretensions to the imperial dignity during the rest of the fourteenth century, the princes of that line added to their possessions Carinthia, Istria and the Tyrol.* As a counterbalance to these acquisitions, they lost a great part of their ancient inheritance by unsuccessful wars with the Swiss. According to the custom of partition, so injurious to princely houses, their dominions were divided among three branches: one reigning in Austria, a second in Styria and the adjacent provinces, a third in the Tyrol and Alsace. This had in a considerable degree eclipsed the glory of the house of Hapsburg. But it was now its destiny to revive, and to enter upon a career of prosperity, which has never since been permanently interrupted. Albert, duke of Austria, who had married Sigismund's only daughter, the queen of Hungary and Bohemia, was raised to the imperial throne upon the death of his father-in-law in 1437. He died in two years, leaving his wife pregnant with a son, Ladislaus Posthumus, who afterwards reigned in the two kingdoms just mentioned; and the choice of the electors fell upon Frederic, duke of Styria, second cousin of the last emperor, from whose posterity it never departed, except in a single instance, upon the extinction of his male line in 1740.

CHAP. V. GERMANY. Albert II. 1438

Frederic III. reigned fifty-three years; a longer period than any of his predecessors; and his personal character was more insignificant. With better fortune than could be expected, considering

Reign of Frederic III. 1440—1493

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both these circumstances, he escaped any overt attempt to depose him, though such a project was sometimes in agitation. He reigned during an interesting age, full of remarkable events, and big with others of more leading importance. The destruction of the Greek empire, and appearance of the victorious crescent upon the Danube, gave an unhappy distinction to the earlier years of his reign, and displayed his mean and pusillanimous character in circumstances which demanded a hero. At a later season he was drawn into contentions with France and Burgundy, which ultimately produced a new and more general combination of European politics. Frederic, always poor and scarcely able to protect himself in Austria from the seditions of his subjects, or the inroads of the king of Hungary, was yet another founder of his family, and left their fortunes incomparably more prosperous than at his accession. The marriage of his son Maximilian with the heiress of Burgundy began that aggrandizement of the house of Austria, which Frederic seems to have anticipated.* The electors, who had lost a good deal of their former spirit, and were grown sensible of the necessity of chusing a powerful sovereign, made

* The famous device of Austria, A. E. I. O. U. was first used by Frederic III. who adopted it on his plate, books, and buildings. These initials stand for, Austriæ Est Imperare Orbi Universo; or, in German, Alles Erdreich Ist Osterreich Unterthan. A bold assumption for a man who was not safe in an inch of his dominions. Struvius, p. 722. He confirmed the arch-ducal title of his family, which might seem implied in the original grant of Frederic I.; and bestowed other high privileges above all princes of the empire. These are enumerated in Coxe's House of Austria, vol. i. p. 363.

no opposition to Maximilian's becoming king of the Romans in his father's life-time. The Austrian provinces were re-united, either under Frederic, or in the first years of Maximilian; so that, at the close of that period which we denominate the Middle Ages, the German empire, sustained by the patrimonial dominions of its chief, became again considerable in the scale of nations, and capable of preserving a balance between the ambitious monarchies of France and Spain. CHAP. V. GERMANY.

The period between Rodolph and Frederic III. is distinguished by no circumstance so interesting as the prosperous state of the free imperial cities, which had attained their maturity about the commencement of that interval. We find the cities of Germany, in the tenth century, divided into such as depended immediately upon the empire, which were usually governed by their bishop as imperial vicar, and such as were included in the territories of the dukes and counts.* Some of the former, lying principally upon the Rhine and in Franconia, acquired a certain degree of importance before the expiration of the eleventh century. Worms and Cologne manifested a zealous attachment to Henry IV. whom they supported in despite of their bishops.† His son Henry V. granted privileges of enfranchisement to the inferior townsmen of Progress of free imperial cities.

* Pfeffel, p. 187. The Othos adopted the same policy in Germany which they had introduced in Italy, conferring the temporal government of cities upon the bishops, probably as a counterbalance to the lay aristocracy. Putter, p. 136. Struvius, p. 282.

† Schmidt, t. iii. p. 239.

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artizans who had hitherto been distinguished from the upper class of freemen, and particularly relieved them from oppressive usages, which either gave the whole of their moveable goods to the lord upon their decease, or at least enabled him to seize the best chattel as his heriot.* He took away the temporal authority of the bishop, at least in several instances, and restored the cities to a more immediate dependence upon the empire. The citizens were classed in companies, according to their several occupations; an institution which was speedily adopted in other commercial countries. It does not appear, that any German city had obtained, under this emperor, those privileges of chusing its own magistrates, which were conceded about the same time, in a few instances, to those of France.† Gradually, however, they began to elect councils of citizens, as a sort of senate and magistracy. This innovation might perhaps take place as early as the reign of Frederic I.;‡ at least it was fully established in that of his grandson. They were at first only assistants to the imperial or episcopal bailiff, who probably continued to administer criminal justice. But in the thirteenth century, the citizens, grown richer and stronger, either purchased the jurisdiction, or usurped it

* Schmidt, p. 242. Pfeffel, p. 293. Dumont, Corps Diplomatique, t. i. p. 64

† Schmidt, p. 245.

‡ In the charter granted by Frederic I. to Spire in 1182, confirming and enlarging that of Henry V. though no express mention is made of any municipal jurisdiction, yet it seems implied in the following words: Causam in civitate jam lite contestatam non episcopus aut alia potestas extra civitatem determinari compellet Dumont, p. 108.

through the lord's neglect, or drove out the bailiff by force.* The great revolution in Franconia and Swabia occasioned by the fall of the Hohenstaufen family completed the victory of the cities. Those which had depended upon mediate lords became immediately connected with the empire; and with the empire in its state of feebleness, when an occasional present of money would easily induce its chief to acquiesce in any claims of immunity which the citizens might prefer.

It was a natural consequence of the importance which the free cities had reached, and of their immediacy, that they were admitted to a place in the diets, or general meetings of the confederacy. They were tacitly acknowledged to be equally sovereign with the electors and princes. No proof exists of any law, by which they were adopted into the diet. We find it said, that Rodolph of Hapsburg, in 1291, renewed his oath with the princes, lords and cities. Under the emperor Henry VII. there is unequivocal mention of the three orders composing the diet; electors, princes, and deputies from cities.† And in 1344, they appear as a third distinct college in the diet of Frankfort.‡

The inhabitants of these free cities always preserved their respect for the emperor, and gave him much less vexation than his other subjects. He was indeed their natural friend. But their nobility

* Schmidt, t. iv. p. 96. Pfeffel, p. 441.

† Mansit ibi rex sex hebdomadibus cum principibus electoribus et aliis principibus et civitatum nuntiis, de suo transitu et de prestandis servitiis in Italiam disponendo. Auctor apud Schmidt, t. vi. p. 31.

‡ Pfeffel, p. 388.

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and princes were their natural enemies; and the western parts of Germany were the scenes of irreconcileable warfare between the possessors of fortified castles and the inhabitants of fortified cities. Each party was frequently the aggressor. The nobles were too often mere robbers, who lived upon the plunder of travellers. But the citizens were almost equally inattentive to the rights of others. It was their policy to offer the privileges of burghership to all strangers. The peasantry of feudal lords, flying to a neighbouring town, found an asylum constantly open. A multitude of aliens thus seeking as it were sanctuary, dwelt in the suburbs or liberties, between the city walls and the palisades which bounded the territory. Hence they were called Pfahlburger, or burgesses of the palisades; and this encroachment on the rights of the nobility, was positively, but vainly, prohibited by several imperial edicts, especially the Golden Bull. Another class were the Ausburger, or outburghers, who had been admitted to privileges of citizenship, though resident at a distance, and pretended in consequence to be exempted from all dues to their original feudal superiors. If a lord resisted so unreasonable a claim, he incurred the danger of bringing down upon himself the vengeance of the citizens. These outburghers are in general classed under the general name of Pfahlburger by contemporary writers.*

* Schmidt, t. iv. p. 98, t. vi. p. 76. Pfeffel, p. 402. Du Cange, Gloss. v. Pfalburger. Fauxbourg is derived from this word.

As the towns were conscious of the hatred which the nobility bore towards them, it was their interest to make a common cause, and render mutual assistance. From this necessity of maintaining, by united exertions, their general liberty, the German cities never suffered the petty jealousies, which might no doubt exist among them, to ripen into such deadly feuds as sullied the glory, and ultimately destroyed the freedom of Lombardy. They withstood the bishops and barons by confederacies of their own, framed expressly to secure their commerce against rapine, or unjust exactions of toll. More than sixty cities, with three ecclesiastical electors at their head, formed the league of the Rhine in 1255, to repel the inferior nobility, who, having now become immediate, abused that independence by perpetual robberies.* The Hanseatic Union owes its origin to no other cause, and may be traced perhaps to rather a higher date. About the year 1370, a league was formed, which, though it did not continue so long, seems to have produced more striking effects in Germany. The cities of Swabia and the Rhine united themselves in a strict confederacy against the princes, and especially the families of Wirtemburg and Bavaria. It is said that the emperor Wenceslaus secretly abetted their projects. The recent successes of the Swiss, who had now almost established their republic, inspired their neighbours in the empire with ex-

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* Struvius, p. 498. Schmidt, t. iv. p. 101. Pfeffel, p. 416.

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pectations which the event did not realize; for they were defeated in this war, and ultimately compelled to relinquish their league. Counter-associations were formed by the nobles, styled society of St. George, St. William, the Lion, or the Panther.†

Provincial states of the empire.

The spirit of political liberty was not confined to the free immediate cities. In all the German principalities, a form of limited monarchy prevailed, reflecting, on a reduced scale, the general constitution of the empire.* As the emperors shared their legislative sovereignty with the diet, so all the princes who belonged to that assembly had their own provincial states composed of their feudal vassals, and of the mediate towns within their territory. No tax could be imposed without consent of the states; and, in some countries, the prince was obliged to account for the proper disposition of the money granted. In all matters of importance affecting the principality, and especially in cases of partition, it was necessary to consult them; and they sometimes decided between competitors in a disputed succession, though this indeed more strictly belonged to the emperor. The provincial states concurred with the prince in making laws, except such as were enacted by the general diet. The city of Wurtzburgh, in the fourteenth century, tells its bishop, that if a lord would make any new ordinance, the custom is

* Struvius, p. 649. Pfeffel, p. 536. Schmidt, t. v. p. 10., t. vi. p. 78. Putter, p. 293.

that he must consult the citizens, who have always opposed his innovating upon the ancient laws without their consent.*

Alienation of the imperial domain.

The ancient imperial domain, or possessions which belonged to the chief of the empire as such, had originally been very extensive. Besides large estates in every province, the territory upon each bank of the Rhine, afterwards occupied by the Counts Palatine, and ecclesiastical electors, was, until the thirteenth century, an exclusive property of the emperor. This imperial domain was deemed so adequate to the support of his dignity, that it was usual, if not obligatory, for him to grant away his patrimonial domains upon his election. But the necessities of Frederic II., and the long confusion that ensued upon his death, caused the domain to be almost entirely dissipated. Rodolph made some efforts to retrieve it, but too late; and the poor remains of what had belonged to Charlemagne and Otho were alienated by Charles IV.† This produced a necessary change in that part of the constitution which deprived an emperor of hereditary possessions. It was however some time before it took place. Even Albert I. conferred the duchy of Austria upon his sons when he was chosen emperor.‡ Louis of Bavaria was the first who retained his hereditary dominions, and made them his residence.§ Charles

* Schmidt, t. vi. p. 8. Putter, p. 236.

† Pfeffel, p. 580

‡ Id. p. 491. Struvius, p. 540

§ Struvius, p. 611. In the capitulation of Robert, it was expressly provided, that he should retain any escheated fief for the domain,

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IV. and Wenceslaus lived almost wholly in Bohemia; Sigismund chiefly in Hungary; Frederic III. in Austria. This residence in their hereditary countries, while it seemed rather to lower the imperial dignity, and to lessen their connexion with the general confederacy, gave them intrinsic power and influence. If the emperors of the houses of Luxemburg and Austria were not like the Conrads and Frederics, they were at least very superior in importance to the Williams and Adolphuses of the thirteenth century.

Accession of Maximilian Diet of Worms, 1495

The accession of Maximilian nearly coincides with the expedition of Charles VIII. against Naples; and I should here close the German history of the middle age, were it not for the great epoch which is made by the diet of Worms in 1495. This assembly is celebrated for the establishment of a perpetual public peace, and of a paramount court of justice, the Imperial Chamber.

Establishment of public peace.

The same causes which produced continual hostilities among the French nobility were not likely to operate less powerfully on the Germans, equally warlike with their neighbours, and rather less civilized. But while the imperial government was still vigorous, they were kept under some restraint. We find Henry III., the most powerful of the Franconian emperors, forbidding all private defiances, and establishing solemnly a general

instead of granting it away; so completely was the public policy of the empire reversed Schmidt, t. v. p 44.

peace.* After his time, the natural tendency of manners overpowered all attempts to coerce it, and private war raged without limits in the empire. Frederic I. endeavoured to repress it by a regulation which admitted its legality. This was the law of defiance (jus diffidationis) which required a solemn declaration of war, and three days notice, before the commencement of hostile measures. All persons contravening this provision were deemed robbers and not legitimate enemies.† Frederic II. carried the restraint farther, and limited the right of self-redress to cases where justice could not be obtained. Unfortunately there was, in later times, no sufficient provision for rendering justice. The German empire indeed had now assumed so peculiar a character, and the mass of states who composed it were in so many respects sovereign within their own territories, that wars, unless in themselves unjust, could not be made a subject of reproach against them, nor considered, strictly speaking, as private. It was certainly most desirable to put an end to them by common agreement, and by the only means that could render war unnecessary, the establishment of a supreme jurisdiction. War indeed, legally undertaken, was not the only, nor the severest grievance. A very large proportion of the rural nobility lived by robbery.‡ Their cas-

* Pfeffel, p. 212

† Schmidt, t. iv p. 108 et infra. Pfeffel, p 340. Putter, p 205.

‡ Germani atque Alemanni, quibus census patrimonii ad victum suppetit, et hos qui procul urbibus, aut qui castellis et oppidulis dom-

CHAP. VI. tles, as the ruins still bear witness, were erected upon inaccessible hills, and in defiles that command the public road. An archbishop of Cologne having built a fortress of this kind, the governor inquired how he was to maintain himself, no revenue having been assigned for that purpose. The prelate only desired him to remark, that the castle was situated near the junction of four roads.* As commerce increased, and the example of French and Italian civilization rendered the Germans more sensible to their own rudeness, the preservation of public peace was loudly demanded. Every diet under Frederic III. professed to occupy itself with the two great objects of domestic reformation, peace and law. Temporary cessations, during which all private hostility was illegal, were sometimes enacted; and if observed, which may well be doubted, might contribute to accustom men to habits of greater tranquillity. The leagues of the cities were probably more efficacious checks upon the disturbers of order. In 1486 a ten years peace was proclaimed, and before the expiration of this period the perpetual abolition of the right of defiance was happily accomplished in the diet of Worms.†

These wars, incessantly waged by the states of

nantur, *quorum magna pars latrocinio dedita*, nobiles censent. Pet. de Andlo. apud Schmidt, t v p. 490.

* Quem cum offendatus suus interrogans, de quo castrum deberet reniuere, cum annuis careret reditibus, dicitur respondisse: Quatuor viæ sunt trans castrum situatæ. Auctor apud Schmidt, p 492.

† Schmidt, t. iv. p. 116; t. v. p 338. 371; t vi p 34. Putter, p. 292 348.

Germany, seldom ended in conquest. Very few princely houses of the middle ages were aggrandized by such means. That small and independent nobility, the counts and knights of the empire, whom the unprincipled rapacity of our own age has annihilated, stood through the storms of centuries with little diminution of their numbers. An incursion into the enemy's territory, a pitched battle, a siege, a treaty, are the general circumstances of the minor wars of the middle ages, as far as they appear in history. Before the invention of artillery, a strongly fortified castle, or walled city, was hardly reduced except by famine, which a besieging army, wasting improvidently its means of subsistence, was full as likely to feel. That invention altered the condition of society, and introduced an inequality of forces, that rendered war more inevitably ruinous to the inferior party. Its first and most beneficial effect was to bring the plundering class of the nobility into controul; their castles were more easily taken, and it became their interest to deserve the protection of law. A few of these continued to follow their old profession after the diet of Worms; but they were soon overpowered by the more efficient police established under Maximilian. CHAP. V.

The next object of the diet was to provide an effectual remedy for private wrongs which might supersede all pretence for taking up arms. The administration of justice had always been a high prerogative as well as bounden duty of the empe- Imperial Chamber.

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rors. It was exercised originally by themselves in person, or by the count palatine, the judge who always attended their court. In the provinces of Germany, the dukes were entrusted with this duty; but, in order to controul their influence, Otho the Great appointed provincial counts palatine, whose jurisdiction was in some respects exclusive of that still possessed by the dukes. As the latter became more independent of the empire, the provincial counts palatine lost the importance of their office, though their name may be traced to the twelfth and thirteenth centuries.* The ordinary administration of justice by the emperors went into disuse; in cases where states of the empire were concerned, it appertained to the diet, or to a special court of princes. The first attempt to re-establish an imperial tribunal was made by Frederic II. in a diet held at Mentz in 1235. A judge of the court was appointed to sit daily, with certain assessors, half nobles, half lawyers, and with jurisdiction over all causes, where princes of the empire were not concerned.† Rodolph of Hapsburg endeavoured to give efficacy to this judicature; but after his reign, it underwent the fate of all those parts of the Germanic constitution which maintained the prerogatives of the emperors. Sigismund endeavoured to revive this tribunal; but as he did not render it permanent, nor fix the place of its sittings, it produced little other good than as it excited an earnest anxiety for a regular

* Pfeffel, p. 180.

† Idem, p. 386. Schmidt, t. iv. p. 56.

system. This system, delayed throughout the reign of Frederic III., was reserved for the first diet of his son.* CHAP. V. GER. MANY

The Imperial Chamber, such was the name of the new tribunal, consisted, at its original institution, of a chief judge, who was to be chosen among the princes or counts, and of sixteen assessors, partly of noble or equestrian rank, partly professors of law. They were named by the emperor with the approbation of the diet. The functions of the Imperial Chamber were chiefly the two following. They exercised an appellant jurisdiction over causes that had been decided by the tribunals established in states of the empire. But their jurisdiction in private causes was merely appellant. According to the original law of Germany, no man could be sued except in the nation or province to which he belonged. The early emperors travelled from one part of their dominions to another, in order to render justice consistently with this fundamental privilege. When the Luxemburg emperors fixed their residence in Bohemia, the jurisdiction of the imperial court in the first instance would have ceased of itself by the operation of this ancient rule. It was not, however, strictly complied with; and it is said that the emperors had a concurrent jurisdiction with the provincial tribunals even in private causes. They divested themselves, nevertheless, of this right by

* Pfeffel, t. ii. p. 66.

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granting privileges *de non evocando*; so that no subject of a state which enjoyed such a privilege could be summoned into the imperial court. All the electors possessed this exemption by the terms of the Golden Bull; and it was specially granted to the burgraves of Nuremberg, and some other princes. This matter was finally settled at the diet of Worms; and the Imperial Chamber was positively restricted from taking cognizance of any causes in the first instance, even where a state of the empire was one of the parties. It was enacted, to obviate the denial of justice that appeared likely to result from the regulation in the latter case, that every elector and prince should establish a tribunal in his own dominions, where suits against himself might be entertained.*

The second part of the chamber's jurisdiction related to disputes between two states of the empire. But these two could only come before it by way of appeal. During the period of anarchy which preceded the establishment of its jurisdiction, a custom was introduced, in order to prevent the constant recurrence of hostilities, of referring the quarrels of states to certain arbitrators, called Austregues, chosen among states of the same rank. This conventional reference became so popular that the princes would not consent to abandon it on the institution of the Imperial Chamber; but, on the contrary, it was changed into an invariable

* Schmidt, t. v. p. 373. Putter, p. 372.

and universal law, that all disputes between different states must, in the first instance, be submitted to the arbitration of Austregues.* CHAP. V. GERMANY. Establishment of circles.

The sentence of the chamber would have been very idly pronounced, if means had not been devised to carry them into execution. In earlier times the want of coercive process had been more felt than that of actual jurisdiction. For a few years after the establishment of the chamber, this deficiency was not supplied. But in 1501 an institution, originally planned under Wenceslaus, and attempted by Albert II., was carried into effect. The empire, with the exception of the electorates and the Austrian dominions, was divided into six circles; each of which had its council of states, its director whose province it was to convoke them, and its military force to compel obedience. In 1512 four more circles were added, comprehending those states which had been excluded in the first division. It was the business of the police of the circles to enforce the execution of sentences pronounced by the Imperial Chamber against refractory states of the empire.†

As the judges of the Imperial Chamber were appointed with the consent of the diet, and held their sittings in a free imperial city, its establishment seemed rather to encroach on the ancient prerogatives of the emperors. Maximilian ex- Aulic Council.

* Putter, p. 361 Pfeffel, p. 452.

† Putter, p. 355 Pfeffel, t. ii p. 100

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pressly reserved these in consenting to t[illegible] tribunal. And, in order to revive them, [illegible] afterwards instituted an Aulic Council at Vienna, composed of judges appointed by himself, and under the political controul of the Austrian government. Though some German patriots regarded this tribunal with jealousy, it continued until the dissolution of the empire. The Aulic Council had, in all cases, a concurrent jurisdiction with the Imperial Chamber; an exclusive one in feudal and some other causes. But it was equally confined to cases of appeal; and these, by multiplied privileges de non appellando, granted to the electoral and superior princely houses, were gradually reduced into moderate compass.*

The Germanic constitution may be reckoned complete, as to all its essential characteristics, in the reign of Maximilian. In later times, and especially by the treaty of Westphalia, it underwent several modifications. Whatever might be its defects, and many of them seem to have been susceptible of reformation without destroying the system of government, it had one invaluable excellence: it protected the rights of the weaker against the stronger powers. The law of nations was first taught in Germany, and grew out of the public law of the empire. To narrow, as far as possible, the rights of war and of conquest, was a natural principle of those who belo[illegible] to petty states, and had nothing to tempt them [illegible]mbition.

* Putter, p. 357 Pfeffel, p. 102

No revolution of our own eventful age, except the fall of the ancient French system of government, has been so extensive, or so likely to produce important consequences, as the spontaneous dissolution of the German empire. Whether the new confederacy that has been substituted for that venerable constitution will be equally favourable to peace, justice, and liberty, is among the most interesting and difficult problems that can occupy a philosophical observer.*

Limits of the empire.

At the accession of Conrad the First, Germany had by no means reached its present extent on the eastern frontier. Henry the Fowler and the Othos made great acquisitions upon that side. But tribes of Sclavonian origin, generally called Venedic, or, less properly, Vandal, occupied the northern coast from the Elbe to the Vistula. These were independent and formidable both to the kings of Denmark and princes of Germany, till, in the reign of Frederic Barbarossa, two of the latter, Henry the Lion, duke of Saxony, and Albert the Bear, margrave of Brandenburg, subdued Mecklenburg and Pomerania, which afterwards became duchies of the empire. Bohemia was undoubtedly subject, in a feudal sense, to Frederic I. and his successors; though its connexion with Germany was always slight. The emperors sometimes assumed a sovereignty over Denmark, Hungary, and Poland. But what they gained upon this quarter was compensated by the gradual separation of the Netherlands from their

* The first edition of this work was published early in 1818.

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dominion, and by the still more complete loss of the kingdom of Arles. The house of Burgundy possessed most part of the former, and paid as little regard as possible to the imperial supremacy; though the German diets in the reign of Maximilian still continued to treat the Netherlands as equally subject to their lawful controul with the states on the right bank of the Rhine. But the provinces between the Rhone and the Alps were absolutely separated; Swisserland has completely succeeded in establishing her own independence; and the kings of France no longer sought even the ceremony of an imperial investiture for Dauphiné and Provence.

Bohemia - its constitution

Bohemia, which received the Christian faith in the tenth century, was elevated to the rank of a kingdom near the end of the twelfth. The dukes and kings of Bohemia were feudally dependent upon the emperors, from whom they received investiture. They possessed, in return, a suffrage among the seven electors, and held one of the great offices in the imperial court. But separated by a rampart of mountains, by a difference of origin and language, and perhaps by national prejudices, from Germany, the Bohemians withdrew as far as possible from the general politics of the confederacy. The kings obtained dispensations from attending the diets of the empire, nor were they able to reinstate themselves in the privilege thus abandoned till the beginning of the last century.* The government of this kingdom, in a very slight

* Pfeffel, t. ii. p. 497.

degree partaking of the feudal character,* bore rather a resemblance to that of Poland; but the nobility were divided into two classes, the baronial and the equestrian, and the burghers formed a third state in the national diet. For the peasantry, they were in a condition of servitude, or predial villenage. The royal authority was restrained by a coronation oath, by a permanent senate, and by frequent assemblies of the diet, where a numerous and armed nobility appeared to secure their liberties by law or force.† The sceptre passed, in ordinary times, to the nearest heir of the royal blood; but the right of election was only suspended, and no king of Bohemia ventured to boast of it as his inheritance.‡ This mixture of elective and hereditary monarchy was common, as we have seen, to most European kingdoms in their original constitution, though few continued so long to admit the participation of popular suffrages. CHAP. V. GERMANY.

The reigning dynasty having become extinct in 1306, by the death of Wenceslaus, son of that House of Luxemburg.

* Bona ipsorum tota Bohemia pleraque omnia hereditaria sunt seu allodialia, perpetua feudalia Stransky, Resp Bohemica, p 392 Stransky was a Bohemian protestant, who fled to Holland after the subversion of the civil and religious liberties of his country by the fatal battle of Prague in 1621

† Dubravius, the Bohemian historian, relates (lib. xviii.) that the kingdom having no written laws, Wenceslaus, one of the kings, about the year 1400, sent for an Italian lawyer to compile a code But the nobility refused to consent to this aware, probably, of the consequences of letting in the prerogative doctrines of the civilians. They opposed, at the same time, the institution of an university at Prague, which however took place afterwards under Charles IV.

‡ Stransky, Resp Bohem Coxe's House of Austria, p 487

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Ottocar, who, after extending his conquests to the Baltic sea, and almost to the Adriatic, had lost his life in an unsuccessful contention with the emperor Rodolph, the Bohemians chose John of Luxemburg, son of Henry VII. Under the kings of this family in the fourteenth century, and especially Charles IV. whose character appeared in a far more advantageous light in his native domains than in the empire, Bohemia imbibed some portion of refinement and science.* An university erected by Charles at Prague became one of the most celebrated in Europe. John Huss, rector of the university, who had distinguished himself by opposition to many abuses then prevailing in the church, repaired to the council of Constance, under a safe conduct from the emperor Sigismund. In violation of this pledge, to the indelible infamy of that prince and of the council, he was condemned to be burned; and his disciple, Jerome of Prague, underwent afterwards the same fate. His countrymen, aroused by this atrocity, flew to arms. They found at their head one of those extraordinary men, whose genius, created by nature and called into action by fortuitous events, appears to borrow no reflected light from that of others. John Zisca had not been trained in any school which could have initiated him in the science of war; that indeed, except in Italy, was still rude, and no where more so than in Bohemia. But, self-taught, he became one of the greatest

John Huss 1416

Hussite war.

John Zisca.

* Schmidt. Coxe.

captains who had appeared hitherto in Europe. It renders his exploits more marvellous, that he was totally deprived of sight. Zisca has been called the inventor of the modern art of fortification; the famous mountain near Prague, fanatically called Tabor, became, by his skill, an impregnable entrenchment. For his stratagems, he has been compared to Hannibal. In battle, being destitute of cavalry, he disposed at intervals ramparts of carriages filled with soldiers, to defend his troops from the enemy's horse. His own station was by the chief standard; where, after hearing the circumstances of the situation explained, he gave his orders for the disposition of the army. Zisca was never defeated, and his genius inspired the Hussites with such enthusiastic affection, that some of those who had served under him, refused to obey any other general, and denominated themselves Orphans, in commemoration of his loss. He was indeed a ferocious enemy, though some of his cruelties might, perhaps, be extenuated by the law of retaliation; but to his soldiers affable and generous, dividing among them all the spoil.*

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Even during the life-time of Zisca, the Hussite sect was disunited; the citizens of Prague and many of the nobility contenting themselves with moderate demands, while the Taborites, his peculiar followers, were actuated by a most fanatical frenzy. The former took the name of Calixtins, from their retention of the sacramental cup, of

Calixtins. 1424

Lenfant, Hist de la Guerre des Hussites Schmidt Coxe.

CHAP. V. GERMANY.

which the priests had latterly thought fit to debar laymen; an abuse indeed not sufficient to justify a civil war, but so totally without pretence or apology, that nothing less than the determined obstinacy of the Romish church could have maintained it to this time. The Taborites, though no longer led by Ziska, gained some remarkable victories, but were at last wholly defeated; while the Catholic and Calixtin parties came to an accommodation, by which Sigismund was acknowledged as king of Bohemia, which he had claimed by the title of heir to his brother Wenceslaus, and a few indulgences,
1433 especially the use of the sacramental cup, conceded to the moderate Hussites. But this compact, though concluded by the council of Basle, being ill observed, through the perfidious bigotry of the See of Rome, the reformers armed again to defend their religious liberties, and ultimately elected a nobleman of their own party, by name George
1458 Podiebrad, to the throne of Bohemia, which he maintained during his life with great vigour and prudence.* Upon his death, they chose Uladis-
1471 laus, son of Casimir king of Poland, who afterwards obtained also the kingdom of Hungary.
1527 Both these crowns were conferred on his son Louis, after whose death, in the unfortunate battle of Mohacz, Ferdinand of Austria became sovereign of the two kingdoms.

The Hungarians, that terrible people who laid waste the Italian and German provinces of the

* Lenfant Schmidt Coxe

empire in the tenth century, became proselytes soon afterwards to the religion of Europe, and their sovereign, St. Stephen, was admitted by the pope into the list of Christian kings. Though the Hungarians were of a race perfectly distinct from either the Gothic or the Sclavonian tribes, their system of government was in a great measure analogous. None indeed could be more natural to rude nations who had but recently accustomed themselves to settled possessions, than a territorial aristocracy, jealous of unlimited or even hereditary power in their chieftain, and subjugating the inferior people to that servitude, which, in such a state of society, is the unavoidable consequence of poverty. CHAP. V. GERMANY.

The marriage of an Hungarian princess with Charles II. king of Naples, eventually connected her country far more than it had been with the affairs of Italy. I have mentioned in a different place the circumstances which led to the invasion of Naples by Louis king of Hungary, and the wars of that powerful monarch with Venice. By marrying the eldest daughter of Louis, Sigismund, afterwards emperor, acquired the crown of Hungary, which upon her death without issue he retained in his own right, and was even able to transmit to the child of a second marriage, and to her husband Albert duke of Austria. From this commencement is deduced the connexion between Hungary and Austria. In two years, however, Albert dying left his widow pregnant; but the states of Hungary, jealous of Austrian influence, and of the intrigues of a minority, without waiting for her Sigismund. 1392 1437 Uladislaus. 1440

CHAP. V. GERMANY.

delivery, bestowed the crown upon Uladislaus, king of Poland. The birth of Albert's posthumous son, Ladislaus, produced an opposition in behalf of the infant's right; but the Austrian party turned out the weaker, and Uladislaus, after a civil war of some duration, became undisputed king. Meanwhile a more formidable enemy drew near. The Turkish arms had subdued all Servia, and excited a just alarm throughout Christendom. Uladislaus led a considerable force, to which the presence of the cardinal Julian gave the appearance of a crusade, into Bulgaria, and after several successes, concluded an honourable treaty with Amurath II.

Battle of Warna 1444

But this he was unhappily persuaded to violate, at the instigation of the cardinal, who abhorred the impiety of keeping faith with infidels.* Heaven judged of this otherwise, if the judgment of heaven was pronounced upon the field of Warna. In that fatal battle, Uladislaus was killed, and the Hungarians utterly routed. The crown was now permitted to rest on the head of young Ladislaus; but the regency was allotted by the states of Hungary to a native warrior, John Hunniades.† This

Hunniades

* Æneas Sylvius lays this perfidy on Pope Eugenius IV. Scripsit Cardinali, nullum valere fœdus, quod *se inconsulto* cum hostibus religionis percussum esset. p. 397. The words in italics are slipped in, to give a slight pretext for breaking the treaty.

† Hunniades was a Wallachian, of a small family. The Poles charged him with cowardice at Warna (Æneas Sylvius, p. 398.) And the Greeks impute the same to him, or at least desertion of his troops, at Cossova, where he was defeated in 1448 (Spondanus, ad ann. 1448.) Probably he was one of those prudently brave men, who, when victory is out of their power, reserve themselves to fight another day; which is the character of all partizans accustomed to desultory warfare. This is the apology made for him by Æneas Sylvius: *Nesciebat rei militaris perito nulla in pugnâ salus visa, et*

hero stood in the breach for twelve years against the Turkish power, frequently defeated, but unconquered in defeat. If the renown of Hunniades may seem exaggerated by the partiality of writers who lived under the reign of his son, it is confirmed by more unequivocal evidence, by the dread and hatred of the Turks, whose children were taught obedience by threatening them with his name, and by the deference of a jealous aristocracy to a man of no distinguished birth. He surrendered to young Ladislaus a trust that he had exercised with perfect fidelity; but his merit was too great to be forgiven, and the court never treated him with cordiality. The last, and the most splendid service of Hunniades was the relief of Belgrade. That strong city was besieged by Mahomet II. three years after the fall of Constantinople; its capture would have laid open all Hungary. A tumultuary army, chiefly collected by the preaching of a friar, was entrusted to Hunniades. he penetrated into the city, and having repulsed the Turks in a fortunate sally, wherein Mahomet was wounded, had the honour of compelling him to raise the siege in confusion. The relief of Belgrade was more im-

Relief of Belgrade 1456

salvare aliquos quam omnes perire malunt. Poloni acceptam eo prælio cladem Hunnadis vecordiæ atque ignavia tradiderant; ipse suæ consilia spreta conquestus est. I observe that all the writers upon Hungarian affairs have a party bias one way or other. The best and most authentic account of Hunniades seems to be, still allowing for this partiality, in the chronicle of John Thwrocz, who lived under Matthias. Bonfinius, an Italian compiler of the same age, has amplified this original authority in his three decads of Hungarian history.

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portant in its effect than in its immediate circumstances. It revived the spirits of Europe, which had been appalled by the unceasing victories of the infidels. Mahomet himself seemed to acknowledge the importance of the blow, and seldom afterwards attacked the Hungarians. Hunniades died soon after this atchievement, and was followed by the king Ladislaus.* The states of Hungary, although the emperer Frederic III. had secured to himself, as he thought, the reversion, were justly averse to his character, and to Austrian connexions. They conferred their crown on Matthias Corvinus, son of their great Hunniades. This prince reigned above thirty years with considerable reputation, to which his patronage of learned men, who repaid his munificence with very profuse eulogies, did not a little contribute.† Hungary, at least in his time, was undoubtedly formidable to her neighbours, and held a respectable rank as an independent power in the republic of Europe.

Matthias Corvinus. 1458

* Ladislaus died at Prague, at the age of twenty-two, with great suspicion of poison, which fell chiefly on George Podiebrad and the Bohemians. Æneas Sylvius was with him at the time, and in a letter written immediately after, plainly hints this, and his manner carries with it more persuasion than if he had spoken out. Epist. 324. Mr. Coxe, however, informs us that the Bohemian historians have fully disproved the charge.

† Spondanus frequently blames the Italians, who received pensions from Matthias, or wrote at his court, for exaggerating his virtues, or dissembling his misfortunes. And this was probably the case. However, Spondanus has rather contracted a prejudice against the Corvini. A treatise of Galeotus Martius, an Italian *literateur*, De dictis et factis Mathiæ, though it often notices an ordinary saying as jocosè or facetè dictum, gives a favourable impression of Matthias's ability, and also of his integrity.

The kingdom of Burgundy or Arles comprehended the whole mountainous region which we now call Switzerland. It was accordingly reunited to the Germanic empire by the bequest of Rodolph along with the rest of his dominions. A numerous and ancient nobility, vassals one to another, or to the empire, divided the possession with ecclesiastical lords, hardly less powerful than themselves. Of the former we find the counts of Zaringen, Kyburg, Hapsburg, and Tokenburg most conspicuous; of the latter, the bishop of Coire, the abbot of St. Gall, and abbess of Seckingen. Every variety of feudal rights was early found and long preserved in Helvetia; nor is there any country whose history better illustrates that ambiguous relation, half property and half dominion, in which the territorial aristocracy, under the feudal system, stood with respect to their dependents. In the twelfth century, the Swiss towns rise into some degree of importance. Zuric was eminent for commercial activity, and seems to have had no lord but the emperor. Basle, though subject to its bishop, possessed the usual privileges of municipal government. Berne and Friburg, founded only in that century, made a rapid progress, and the latter was raised, along with Zuric, by Frederic II. in 1218, to the rank of a free imperial city. Several changes in the principal Helvetian families took place in the thirteenth century, before the end of which the house of Hapsburg, under the politic and enterprizing Rodolph, and his son Albert, became possessed,

Switzerland its early history. 1082

CHAP. V.

through various titles, of a great ascendancy in Swisserland.*

GERMANY.

Albert of Austria.

Of these titles none was more tempting to an ambitious chief, than that of advocate to a convent. That specious name conveyed with it a kind of indefinite guardianship, and right of interference, which frequently ended in reversing the conditions of the ecclesiastical sovereign and its vassal. But during times of feudal anarchy, there was perhaps no other means to secure the rich abbies from absolute spoliation; and the free cities in their early stage sometimes adopted the same policy. Among other advocacies, Albert obtained that of some convents which had estates in the vallies of Schwitz and Underwald. These sequestered regions in the heart of the Alps had been for ages the habitation of a pastoral race, so happily forgotten, or so inaccessible in their fastnesses, as to have acquired a virtual independence, regulating their own affairs in their general assembly with a perfect equality, though they acknowledged the sovereignty of the empire.† The people of Schwitz had made Rodolph their advocate. They distrusted Albert, whose succession to his father's inheritance spread alarm through Helvetia. It soon appeared that their suspicions were well founded. Besides the local rights which his ecclesiastical advocacies gave him over part of the forest cantons, he pretended, after his election to

The Swiss

* Planta's History of the Helvetic Confederacy, vol. i. chaps. 2—5.

† Id. c. 4.

the empire, to send imperial bailiffs into their vallies, as administrators of criminal justice. Their oppression of a people unused to controul, whom it was plainly the design of Albert to reddce into servitude, excited those generous emotions of resentment, which a brave and simple race have seldom the discretion to repress. Three men, Stauffacher of Schwitz, Furst of Uri, Melchthal of Underwald, each with ten chosen associates, met by night in a sequestered field, and swore to assert the common cause of their liberties, without bloodshed or injury to the rights of others. Their success was answerable to the justice of their undertaking; the three cantons unanimously took up arms, and expelled their oppressors without a contest. Albert's assassination by his nephew, which followed soon afterwards, fortunately gave them leisure to consolidate their union.* He was succeeded in the empire by Henry VII. jealous of the Austrian family, and not at all displeased at proceedings which had been accompanied with so little violence or disrespect for the empire. But Leopold, duke of Austria, resolved to humble the peasants who had rebelled against his father, led a considerable force into their country. The Swiss, commending themselves to heaven, and determined rather to perish than undergo that yoke a second time, though ignorant of regular discipline, and unprovided with defensive armour, utterly discomfited the assailants at Morgarten.†

Their insurrection

1308

Battle of Morgarten

1315

* Planta, c. 6 † Id. c. 7

CHAP. V. GERMANY.

Formation of Swiss Confederacy

This great victory, the Marathon of Swisserland, confirmed the independence of the three original cantons. After some years, Lucerne, contiguous in situation, and alike in interests, was incorporated into their confederacy. It was far more materially enlarged about the middle of the fourteenth century, by the accession of Zurich, Glaris, Zug and Berne, all which took place within two years. The first and last of these cities had already been engaged in frequent wars with the Helvetian nobility, and their internal polity was altogether republican.* They acquired, not independence, which they already enjoyed, but additional security by this union with the Swiss, properly so called, who in deference to their power and reputation ceded to them the first rank in the league. The eight already enumerated are called the ancient cantons, and continued till the late reformation of the Helvetic system to possess several distinctive privileges, and even rights of sovereignty over subject territories, in which the five cantons of Friburg, Soleure, Basle, Schaffausen, and Appenzel, did not participate. From this time the united cantons, but especially those of Berne and Zuric, began to extend their territories at the expense of the rural nobility. The same contest between these parties, with the same termination, which we know generally to have taken place in Lombardy during the eleventh and twelfth centuries, may be traced with more

* Planta, cc. 8, 9

minuteness in the annals of Switzerland.* Like the Lombards too, the Helvetic cities acted with policy and moderation towards the nobles whom they overcame, admitting them to the franchises of their community, as co-burghers, (a privilege which virtually implied a defensive alliance against any assailant,) and uniformly respecting the legal rights of property. Many feudal superiorities they obtained from the owners in a more peaceable manner, through purchase or mortgage. Thus the house of Austria, to which the extensive domains of the counts of Kyburg had devolved, abandoning after repeated defeats its hopes of subduing the forest cantons, alienated a great part of its possessions to Zuric and Berne.† And the last remnant of their ancient Helvetic territories in Argovia was wrested in 1417 from Frederic count of Tyrol, who imprudently supporting Pope John XXIII. against the council of Constance, had been put to the ban of the empire. These conquests Berne could not be induced to restore, and thus completed the independence of the confederate republics.‡ The other free cities, though not yet incorporated, and the few remaining nobles, whether lay or spiritual, of whom the abbot of St. Gall was the principal, entered into separate leagues with different cantons. Switzerland became therefore, in the first part of the fifteenth century, a free country, acknowledged as such by its neighbouring states, and subject to

CHAP. V. GERMANY.

* Planta, c. 10. † c. 11. ‡ Vol. ii. c. 1.

CHAP. V. GER-MANY.

no external controul, though still comprehended within the nominal sovereignty of the empire.

The affairs of Swisserland occupy a very small space in the great chart of Europe, but in some respects they are more interesting than the revolutions of mighty kingdoms. In whereso-sides do, we find so many claims to our sympathy, or the union of so much virtue with so complete success. In the Italian republics a more splendid temple may seem to have been erected to liberty, but as we approach, the serpents of faction hiss around her altar, and the form of tyranny lurks among the flickering shadows behind the shrine. Swisserland, not absolutely blameless, (for what republic has been so?) but comparatively exempt from tumult, usurpation, and injustice, has well deserved to employ the native pen of an historian, accounted the most eloquent of the last age.* Other nations displayed an insuperable resolution in the defence of walled towns; but the steadiness of the Swiss in the field of battle was without a

* I am unacquainted with Muller's history in the original language; but, presuming the first volume of Mr Planta's History of the Helvetic Confederacy to be a free translation or abridgement of it, I can well conceive that it deserves the encomiums of Madame de Stael, and other foreign critics. It is very rare to meet with such picturesque and lively delineation in a modern historian of distant times. But I must observe, that if the authentic chronicles of Swisserland have enabled Muller to embellish his narration with so much circumstantial detail, he has been remarkably fortunate in his authorities. No man could write the annals of England or France in the fourteenth century with such particularity, if he was scrupulous not to fill up the meagre sketch of chroniclers from the stores of his invention. The striking scenery of Swisserland, and Muller's exact acquaintance with it, have given him another advantage as a *painter* of history.

parallel, unless we recall the memory of Lacedæmon.* It was even established as a law, that whoever returned from battle after a defeat should forfeit his life by the hands of the executioner. Six hundred men, who had been sent to oppose a predatory invasion of the French in 1444, though they might have retreated without loss, determined rather to perish on the spot, and fell amidst a far greater heap of the hostile slain.* At the famous battle of Sempach in 1385, the last which Austria presumed to try against the forest cantons, the enemy's knights, dismounted from their horses, presented an impregnable barrier of lances, which disconcerted the Swiss; till Winkelried, a gentleman of Underwald, commending his wife and children to his countrymen, threw himself upon the opposite ranks, and collecting as many lances as he could grasp, forced a passage for his followers by burying them in his bosom.†

Excellence of the Swiss troops.

The burghers and peasants of Swisserland, ill provided with cavalry, and better able to dispense with it than the natives of champaign countries, may be deemed the principal restorers of the Greek and Roman tactics, which place the strength of armies in a steady mass of infantry. Besides their splendid victories over the dukes of Austria, and their own neighbouring nobility, they had repulsed, in the year 1375, one of those predatory bodies of troops, the scourge of Europe in that age, and to those licentiousness kingdoms and

* Vol. II. c. 2. † Vol. I. c. 10

CHAP. V. GERMANY.

free states yielded alike a passive submission. They gave the Dauphin, afterwards Louis XI., who entered their country in 1444 with a similar body of ruffians, called Armagnacs, the disbanded mercenaries of the English war, sufficient reason to desist from his invasion and to respect their valour. That able prince formed indeed so high a notion of the Swiss, that he sedulously cultivated their alliance during the rest of his life. He was made abundantly sensible of the wisdom of this policy, when he saw his greatest enemy, the duke of Burgundy, routed at Granson and Morat, and his affairs irrecoverably ruined by these hardy republicans. The ensuing age is the most conspicuous, though not the most essentially glorious, in the history of Swisserland. Courted for the excellence of their troops by the rival sovereigns of Europe, and themselves too sensible both to ambitious schemes of dominion and to the thirst of money, the united cantons came to play a very prominent part in the wars of Lombardy, with great military renown, but not without some impeachment of that sterling probity which had distinguished their earlier efforts for independence. These events however do not fall within my limits; but the last year of the fifteenth century is a leading epoch with which I shall close this sketch. Though the house of Austria had ceased to menace the liberties of Helvetia, and had even been for many years its ally, the emperor Maximilian, aware of the important service he might derive from the cantons in his projects upon Italy,

Ratification of their independence in 1500.

as well as of the disadvantage he sustained by their partiality to French interest, endeavoured to revive the unextinguished supremacy of the empire. That supremacy had just been restored in Germany by the establishment of the Imperial Chamber, and of a regular pecuniary contribution for its support as well as for other purposes, in the diet of Worms. The Helvetic cantons were summoned to yield obedience to these imperial laws; an innovation, for such the revival of obsolete prerogatives must be considered, exceedingly hostile to their republican independence, and involving consequences not less material in their eyes, the abandonment of a line of policy which tended to enrich, if not to aggrandize them. Their refusal to comply brought on a war, wherein the Tyrolese subjects of Maximilian, and the Swabian league, a confederacy of cities in that province lately formed under the emperor's auspices, were principally engaged against the Swiss. But the success of the latter was decisive, and after a terrible devastation of the frontiers of Germany, peace was concluded upon terms very honourable for Swisserland. The cantons were declared free from the jurisdiction of the Imperial Chamber, and from all contributions imposed by the diet. Their right to enter into foreign alliance, even hostile to the empire, if it was not expressly recognized, continued unimpaired in practice; nor am I aware that they were at any time afterwards supposed to incur the crime of rebellion by such proceedings.

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Though, perhaps, in the strictest letter of public law, the Swiss cantons were not absolutely released from their subjection to the empire until the treaty of Westphalia, their real sovereignty must be dated by an historian from the year when every prerogative which a government can exercise was finally abandoned.*

* Planta, vol. II. c. 4.

CHAPTER VI.

HISTORY OF THE GREEKS AND SARACENS.

Rise of Mahommedism—Causes of its Success—Progress of Saracen Arms—Greek Empire—Decline of the Khalifs—The Greeks recover part of their Losses—The Turks—The Crusades—Capture of Constantinople by the Latins—Its Recovery by the Greeks—The Moguls—The Ottomans—Danger of Constantinople—Timur—Capture of Constantinople by Mahomet II.—Alarm of Europe.

THE difficulty which occurs to us in endeavouring to fix a natural commencement of modern history even in the Western countries of Europe is much enhanced when we direct our attention to the Eastern Empire. In tracing the long series of the Byzantine annals, we never lose sight of antiquity; the Greek language, the Roman name, the titles, the laws, all the shadowy circumstance of ancient greatness, attend us throughout the progress from the first to the last of the Constantines; and it is only when we observe the external condition and relations of their empire, that we perceive ourselves to be embarked in a new sea, and are compelled to deduce, from points of bearing to the history of other nations, a line of separation, which the domestic revolutions of Constantinople would not satisfactorily afford. The appearance of Mohammed, and the conquests of his disciples, present an epoch in the history of Asia, still more important and more definite than the subversion of the Roman empire in Europe; and hence the boundary line

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between the ancient and modern divisions of Byzantine history will intersect the reign of Heraclius: That prince may be said to have stood on the verge of both hemispheres of time, whose youth was crowned with the last victories over the successors of Artaxerxes, and whose age was clouded by the first calamities of Mohammedan invasion.

Appearance of Mohammed.

Of all the revolutions which have had a permanent influence upon the civil history of mankind, none could so little be anticipated by human prudence as that effected by the religion of Arabia. As the seeds of invisible disease grow up sometimes in silence to maturity, till they manifest themselves hopeless and irresistible, the gradual propagation of a new faith in a barbarous country beyond the limits of the empire was hardly known perhaps, and certainly disregarded, in the court of Constantinople. Arabia, in the age of Mohammed, was divided into many small states, most of which, however, seem to have looked up to Mecca as the capital of their nation and the chief seat of their religious worship. The capture of that city accordingly, and subjugation of its powerful and numerous aristocracy, readily drew after it the submission of the minor tribes, who transferred to the conqueror the reverence they were used to shew to those he had subdued. If we consider Mohammed only as a military usurper, there is nothing more explicable, or more analogous, especially, to the course of Oriental history, than his success. But as the author of a religious imposture, upon which, though avowedly unattested by miraculous powers, and though originally dis-

countenanced by the civil magistrate, he had the boldness to found a scheme of universal dominion, which his followers were half enabled to realize, it is a curious speculation, by what means he could inspire so sincere, so ardent, so energetic, and so permanent a belief.

Causes of his success.

A full explanation of the causes which contributed to the progress of Mohammedism is not perhaps at present attainable by those most conversant with this department of literature.* But we may point out several of leading importance: in the first place, those just and elevated notions of the divine nature, and of moral duties, the gold ore that pervades the dross of the Koran, which were calculated to strike a serious and reflecting people, already perhaps disinclined, by intermixture with their Jewish and Christian fellow-citizens, to the superstitions of their ancient idolatry.† next, the

* We are very destitute of satisfactory materials for the history of Mohammed himself. Abulfeda, the most judicious of his biographers, lived in the fourteenth century, when it must have been morally impossible to discriminate the truth amidst the torrent of fabulous tradition. Al Jannabi, whom Gagnier translated, is a mere legend writer; it might be as rational to quote the Acta Sanctorum as his romance. It is therefore difficult to ascertain the real character of the prophet, except as it is deducible from the Koran; and some sceptical Orientalists, if I am not mistaken, have called in question the absolute genuineness even of that. Gibbon has hardly apprised the reader sufficiently of the crumbling foundation upon which his narrative of Mohammed's life and actions depends.

† The very curious romance of Antar, written, perhaps, before the appearance of Mohammed, seems to render it probable that however idolatry, as we are told by Sale, might prevail in some parts of Arabia, yet the genuine religion of the descendants of Ishmael was a belief in the unity of God, as strict as is laid down in the Koran itself, and accompanied by the same antipathy, partly religious, partly national, towards the Fire-worshippers, which Mohammed inculcated. This corroborates what I had said in the text before the publication of that work.

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artful incorporation of tenets, usages, and traditions from the various religions that existed in Arabia;* and thirdly, the extensive application of the precepts in the Koran, a book confessedly written with more elegance and purity, to all legal transactions, and all the business of life. It may be expected that I should add to these, what is commonly considered as a distinguishing mark of Mohammedism, its indulgence to voluptousness. But this appears to be greatly exaggerated. Although the character of its founder may have been tainted by sensuality as well as ferociousness, I do not think that he relied upon inducements of the former kind for the diffusion of his system. We are not to judge of this by rules of Christian purity, or of European practice. If polygamy was a prevailing usage in Arabia, as is not questioned, its permission gave no additional license to the proselytes of Mohammed, who will be found rather to have narrowed the unbounded liberty of Oriental manners in this respect; while his decided con-

* I am very much disposed to believe, notwithstanding what seems to be the general opinion, that Mohammed had never read any part of the New Testament. His knowledge of Christianity appears to be wholly derived from the apocryphal gospels, and similar works. He admitted the miraculous conception and prophetic character of Jesus, but not his divinity or pre-existence. Hence it is rather surprising to read, in a popular book of sermons, by a living prelate, that all the heresies of the Christian church (I quote the substance from memory) are to be found in the Koran, but especially that of Arianism. No one who knows what Arianism is, and what Mohammedism is, could possibly fall into so strange an error. The misfortune has been, that the learned writer, while accumulating a mass of reading upon this part of his subject, neglected what should have been the *nucleus* of the whole, a perusal of the single book which contains the doctrine of the Arabian impostor. In this strange chimera about the Arianism of Mohammed, he has been led away by a misplaced trust in Whitaker; a writer almost invariably in the wrong, and whose bad reasoning upon all the points of historical criticism, which he attempted to discuss, is quite notorious.

demnation of adultery, and of incestuous connexions, so frequent among barbarous nations, does not argue a very lax and accommodating morality. A devout Mussulman exhibits much more of the Stoical than the Epicurean character. Nor can any one read the Koran without being sensible that it breathes an austere and scrupulous spirit. And in fact the founder of a new religion or sect is little likely to obtain permanent success by indulging the vices and luxuries of mankind. I should rather be disposed to reckon the severity of Mohammed's discipline among the causes of its influence. Precepts of ritual observance, being always definite and unequivocal, are less likely to be neglected, after their obligation has been acknowledged, than those of moral virtue. Thus the long fasting, the pilgrimages, the regular prayers and ablutions, the constant almsgiving, the abstinence from stimulating liquors, enjoined by the Koran, created a visible standard of practice among its followers, and preserved a continual recollection of their law.

But the prevalence of Islâm in the life-time of its phophet, and during the first ages of its existence, was chiefly owing to the spirit of martial energy that he infused into it. The religion of Mohammed is as essentially a military system as the institution of chivalry in the west of Europe. The people of Arabia, a race of strong passions and sanguinary temper, enured to habits of pillage and murder, found in the law of their native prophet, not a license, but a command to desolate the world, and the promise of all that their glowing

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imaginations could anticipate of Paradise annexed to all in which they most delighted upon earth. It is difficult for us, in the calmness of our closets, to conceive that feverish intensity of excitement to which man may be wrought, when the animal and intellectual energies of his nature converge to a point, and the buoyancy of strength and courage reciprocates the influence of moral sentiment or religious hope. The effect of this union I have formerly remarked in the Crusades; a phenomenon perfectly analogous to the early history of the Saracens. In each, one hardly knows whether most to admire the prodigious exertions of heroism, or to revolt from the ferocious bigotry that attended them. But the Crusades were a temporary effort, not thoroughly congenial to the spirit of Christendom, which, even in the darkest and most superstitious ages, was not susceptible of the solitary and over-ruling fanaticism of the Moslems. They needed no excitement from pontiffs and preachers to atchieve the work to which they were called; the precept was in their law, the principle was in their hearts, the assurance of success was in their swords. O prophet, exclaimed Ali, when Mohammed, in the first years of his mission, sought among the scanty and hesitating assembly of his friends a vizir and lieutenant in command, I am the man; whoever rises against thee, I will dash out his teeth, tear out his eyes, break his legs, rip up his belly. O prophet, I will be thy vizir over them.* These words of Moham-

* Gibbon, vol. ix p. 284.

med's early and illustrious disciple are, as it were, a text, upon which the commentary expands into the whole Saracenic history. They contain the vital essence of his religion, implicit faith and ferocious energy. Death, slavery, tribute to unbelievers, were the glad tidings of the Arabian prophet. To the idolaters indeed, or those who acknowledged no special revelation, one alternative only was proposed, conversion or the sword. The People of the Book, as they are termed in the Koran, or four sects of Christians, Jews, Magians, and Sabians, were permitted to redeem their adherence to their ancient law, by the payment of tribute, and other marks of humiliation and servitude. But the limits which Mohammedan intolerance had prescribed to itself were seldom transgressed, the word pledged to unbelievers was seldom forfeited; and with all their insolence and oppression, the Moslem conquerors were mild and liberal in comparison with those who obeyed the pontiffs of Rome or Constantinople.

First conquests of the Saracens.

At the death of Mohammed in 632, his temporal and religious sovereignty embraced, and was limited by, the Arabian peninsula. The Roman and Persian empires, engaged in tedious and indecisive hostility upon the rivers of Mesopotamia, and the Armenian mountains, were viewed by the ambitious fanatics of his creed as their quarry. In the very first year of Mohammed's immediate successor, Abubeker, each of these mighty empires was invaded. The latter opposed but a short resistance. The crumbling fabric of eastern des-

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potism is never secure against rapid and total subversion; a few victories, a few sieges, carried the Arabian arms from the Tigris to the Oxus; and overthrew, with the Sassanian dynasty, the ancient and famous religion they had professed. Seven years of active and unceasing warfare sufficed to subjugate the rich province of Syria, though de-
632— fended by numerous armies and fortified cities;
639. and the khalif Omar had scarcely returned thanks for the accomplishment of this conquest, when Amrou his lieutenant announced to him the entire reduction of Egypt. After some interval the Saracens won their way along the coast of
647— Africa as far as the pillars of Hercules, and a third
698. province was irretrievably torn from the Greek empire. These western conquests introduced them to fresh enemies, and ushered in more splendid successes; encouraged by the disunion of the Visigoths, and invited by treachery, Musa, the general of a master who sat beyond the oppo-
710 site extremity of the Mediterranean Sea, passed over into Spain, and within about two years the name of Mohammed was invoked under the Pyrenees.*

Ockley's History of the Saracens. Cardonne, Revolutions de l'Afrique et de l'Espagne. The former of these works is well known, and justly admired for its simplicity and picturesque details. Scarcely any narrative has ever excelled in beauty that of the death of Hossein. But these do not tend to render it more deserving of confidence. On the contrary, it may be laid down as a pretty general rule, that *circumstantiality*, which enhances the credibility of a witness, diminishes that of an historian, remote in time or situation. And I observe that Reiske, in his preface to Abulfeda, speaks of Makidi, from whom Ockley's book is but a translation, as a mere fabulist.

These conquests, which astonish the careless and superficial, are less perplexing to a calm inquirer than their cessation; the loss of half the Roman empire, than the preservation of the rest. A glance from Medina to Constantinople in the middle of the seventh century would probably have induced an indifferent spectator, if such a being may be imagined, to anticipate by eight hundred years the establishment of a Mohammedan dominion upon the shores of the Hellespont. The fame of Heraclius had withered in the Syrian war; and his successors appeared as incapable to resist, as they were unworthy to govern. Their despotism, unchecked by law, was often punished by successful rebellion; but not a whisper of civil liberty was ever heard, and the vicissitudes of servitude and anarchy consummated the moral degeneracy of the nation. Less ignorant than the western barbarians, the Greeks abused their ingenuity in theological controversies, those especially which related to the nature and incarnation of our Saviour; wherein the disputants, as is usual, became more positive and rancorous, as their creed receded from the possibility of human apprehension. Nor were these confined to the clergy, who had not, in the east, obtained the prerogative of guiding the national faith; the sovereigns sided alternately with opposing factions; Heraclius was not too brave, nor Theodora too infamous, for discussions of theology; and the dissenters from an imperial decision were involved in the double proscription of treason and

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heresy. But the persecutors of their opponents at home pretended to cowardly scrupulousness in the field; nor was the Greek church ashamed to require the lustration of a canonical penance from the soldier, who shed the blood of his enemies in a national war.

Decline of the Saracens.

But this depraved people were preserved from destruction by the vices of their enemies, still more than by some intrinsic resources which they yet possessed. A rapid degeneracy enfeebled the victorious Moslems in their career. That irresistible enthusiasm, that earnest and disinterested zeal of the companions of Mohammed was in a great measure lost, even before the first generation had passed away. In the fruitful vallies of Damascus and Bassora, the Arabs of the desert forgot their abstemious habits. Rich from the tributes of an enslaved people, the Mohammedan sovereigns knew no employment of riches but in sensual luxury, and paid the price of voluptuous indulgence in the relaxation of their strength and energy. Under the reign of Moawiyah, the fifth khalif, an hereditary succession was substituted for the free choice of the faithful, by which the first representatives of the prophet had been elevated to power; and this regulation, necessary as it plainly was, to avert in some degree the dangers of schism and civil war, exposed the kingdom to the certainty of being often governed by feeble tyrants. But no regulation could be more than a temporary preservative against civil war. The dissensions which still separate and render hostile

the followers of Mohammed may be traced to the first events that ensued upon his death, to the rejection of his son-in-law Ali by the electors of Medina. Two reigns, those of Abubeker and Omar, passed in external glory and domestic reverence; but the old age of Othman was weak and imprudent, and the conspirators against him established the first among a hundred precedents of rebellion and regicide. Ali was now chosen; but a strong faction disputed his right; and the Saracen empire was for many years distracted with civil war among competitors, who appealed, in reality, to no other decision than that of the sword. The family of Ommiyah succeeded at last in establishing an unresisted, if not an undoubted title. But rebellions were perpetually afterwards breaking out in that vast extent of dominion, till one of these revolters acquired by success a better name than rebel, and founded the dynasty of the Abbassides. 750

Khalifs of Bagdad

Damascus had been the seat of empire under the Ommiades; it was removed by the succeeding family to their new city of Bagdad. There are not any names in the long line of khalifs, after the companions of Mohammed, more renowned in history than some of the earlier sovereigns who reigned in this capital, Almansor, Haroun Alraschid, and Almamùn. Their splendid palaces, their numerous guards, their treasures of gold and silver, the populousness and wealth of their cities, formed a striking contrast to the rudeness and poverty of the western nations in the same age. In their court, learning, which the first Moslem

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had despised as unwarlike, or rejected as profane, was held in honour.* The khalif Almamùn, especially, was distinguished for his patronage of letters; the philosophical writings of Greece were eagerly sought and translated; the stars were numbered, the course of the planets was measured; the Arabians improved upon the science they borrowed, and returned it with abundant interest to Europe in the communication of numeral figures and the intellectual language of algebra.† Yet the merit of the Abbassides has been exaggerated by adulation or gratitude. After all the vague praises of hireling poets, which have sometimes been repeated in Europe, it is very rare to read the history of an eastern sovereign unstained by atrocious crimes. No Christian government, except perhaps that of Constantinople, exhibits such a series of tyrants as the khalifs of Bagdad; if deeds of blood wrought through unbridled passion, or jealous policy, may challenge the name of tyranny. These are ill redeemed by ceremonious devotion,

* The Arabian writers date the origin of their literature (except those works of fiction which had always been popular) from the reign of Almansor, A. D. 758 Abulpharagius, p. 160. Gibbon, c. 52.

† Several very recent publications contain interesting details on Saracen literature. Berington's Literary History of the Middle Ages, Miller's History of Mohammedanism, Vol. Turner's History of England, vol. i. Harris's Philological Arrangements is perhaps a book better known; and though it has since been much excelled, was one of the first contributions, in our own language, to this department, in which a great deal yet remains for the oriental scholars of Europe. Casiri's admirable catalogue of Arabic MSS. in the Escurial ought before this to have been followed up by a more accurate examination of their contents than it was possible for him to give. But general literature and the fine

and acts of trifling, perhaps ostentatious humility; or even by the best attribute of Mohammedan princes, a rigorous justice in chastising the offences of others. Anecdotes of this description give as imperfect a sketch of an oriental sovereign, as monkish chroniclers sometimes draw of one in Europe who founded monasteries and obeyed the clergy; though it must be owned that the former are in much better taste. CHAP. VI. GREEKS AND SARACENS.

Though the Abbassides have acquired more celebrity, they never attained the real strength of their predecessors. Under the last of the house of Ommiyah, one command was obeyed almost along the whole diameter of the known world, from the banks of the Sihon to the utmost promontory of Portugal. But the revolution which changed the succession of khalifs produced another not less important. A fugitive of the vanquished family, by name Abdalrahman, arrived in Spain; and the Moslems of that country, not sharing in the prejudices which had stirred up the Persians in favour of the line of Abbas, and conscious that their remote situation entitled them to independence, proclaimed him khalif of Cordova. There could be little hope of reducing so distant a dependency; and the example was not unlikely to be imitated. In the reign of Haroun Alraschid, two principalities were formed in Africa; of the Aglabites who reigned over Tunis and Tripoli; and of the Edrisites in the western parts of Barbary. These yielded in about a century to the Fatimites, Separation of Spain and Africa.

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a more powerful dynasty, who afterwards established an empire in Egypt.*

Decline of the khalifs.

The loss, however, of Spain and Africa was the inevitable effect of that immensely extended dominion, which their separation alone would not have enfeebled. But other revolutions awaited it at home. In the history of the Abbassides of Bagdad we read over again the decline of European monarchies, through their various symptoms of ruin; and find alternate analogies to the insults of the barbarians towards imperial Rome in the fifth century, to the personal insignificance of the Merovingian kings, and to the feudal usurpations that dismembered the inheritance of Charlemagne. 1. Beyond the north-eastern frontier of the Saracen empire dwelt a warlike and powerful nation of the Tartar family, who defended the independence of Turkestan from the sea of Aral to the great central chain of mountains. In the wars which the khalifs or their lieutenants waged against them, many of these Turks were led into captivity, and dispersed over the empire. Their strength and courage distinguished them among a people grown effeminate by luxury; and that jealousy of disaffection among his subjects, so natural to an eastern monarch, might be an additional motive with the khalif Motassem to form bodies of guards out of these prisoners. But his policy was fatally erroneous. More rude, and even more ferocious

* For these revolutions, which it is not very easy to fix in the memory, consult Cardonne, who has made as much of them as the subject would bear.

than the Arabs, they contemned the feebleness of the khalifate, while they grasped at its riches. The son of Motassem, Motawakkel, was murdered in his palace by the barbarians of the north; and his fate revealed the secret of the empire, that the choice of its sovereign had passed to their slaves. Degradation and death were frequently the lot of succeeding khalifs; but in the east, the son leaps boldly on the throne which the blood of his father has stained, and the prætorian guards of Bagdad rarely failed to render a fallacious obedience to the nearest heir of the house of Abbas. 2. In about one hundred years after the introduction of the Turkish soldiers, the sovereigns of Bagdad sunk almost into oblivion. Al Radi, who died in 940, was the last of these that officiated in the mosque, that commanded the forces in person, that addressed the people from the pulpit, that enjoyed the pomp and splendour of royalty.* But, he was the first who appointed, instead of a vizir, a new officer, a mayor, as it were, of the palace, with the title of Emir al Omra, commander of commanders, to whom he delegated by compulsion the functions of his office. This title was usually seized by active and martial spirits; it was sometimes hereditary, and in effect irrevocable by the khalifs, whose names hardly appear after this time in oriental annals. 3. During these revolutions of the palace, every province successively shook off

* Abulfeda, p. 261. Gibbon, c. 52. Modern Univ. Hist. vol. ii. Al Radi's command of the army is only mentioned by the last.

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its allegiance; new principalities were formed in Syria and Mesopotamia, as well as in Khorasan and Persia, till the dominion of the Commander of the Faithful was literally confined to the city of Bagdad and its adjacent territory. For a time some of these princes, who had been appointed as governors by the khalifs, professed to respect his supremacy, by naming him in the public prayers and upon the coin; but these tokens of dependence were gradually obliterated.*

Revival of the Greek Empire.

Such is the outline of Saracenic history for three centuries after Mohammed; one age of glorious conquest; a second of stationary, but rather precarious greatness; a third of rapid decline. The Greek empire meanwhile survived, and almost recovered from the shock it had sustained. Besides the decline of its enemies, several circumstances may be enumerated, tending to its preservation. The maritime province of Cilicia had been overrun by the Mohammedans; but between this and the Lesser Asia Mount Taurus raises its massy buckler, spreading, as a natural bulwark, from the sea-coast of the ancient Pamphylia to the hilly district of Isauria, whence it extends in an easterly direction, separating the Cappadocian and Cilician plains, and after throwing off considerable ridges to the north and south, connects itself with other chains of mountains that penetrate far into the Asiatic continent. Beyond this barrier the

* The decline of the Saracens is fully discussed in the 52d chapter of Gibbon, which is, in itself, a complete philosophical dissertation upon this part of history.

Saracens formed no durable settlement, though the armies of Alraschid wasted the country as far as the Hellespont, and the city of Amorium in Phrygia was razed to the ground by Al Motassem. The position of Constantinople, chosen with a sagacity to which the course of events almost gave the appearance of prescience, secured her from any immediate danger on the side of Asia, and rendered her as little accessible to an enemy, as any city which valour and patriotism did not protect. Yet in the days of Arabian energy, she was twice attacked by great naval armaments; the first siege, or rather blockade, continued for seven years; the second, though shorter, was more terrible, and her walls, as well as her port, were actually invested by the combined forces of the khalif Waled, under his brother Moslema.* The final discomfiture of these assailants shewed the resisting force of the empire, or rather of its capital; but perhaps the abandonment of such maritime enterprizes by the Saracens may be in some measure ascribed to the removal of their metropolis from Damascus to Bagdad. But the Greeks in their turn determined to dispute the command of the sea. By possessing the secret of an inextinguishable fire, they fought on superior terms: their wealth, perhaps their skill, enabled them to employ larger and better appointed vessels; and they ultimately expelled their enemies from the islands of Crete and Cyprus. By

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* Gibbon, c. 52.

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land, they were less desirous of encountering the Moslems. The science of tactics is studied by the pusillanimous, like that of medicine by the sick; and the Byzantine emperors, Leo and Constantine, have left written treatises on the art of avoiding defeat, of protracting contest, of resisting attack.* But this timid policy, and even the purchase of armistices from the Saracens, were not ill calculated for the state of both nations; while Constantinople temporized, Bagdad shook to her foundations; and the heirs of the Roman name might boast the immortality of their [illegible] empire, when they contemplated the dissolution of that which had so rapidly sprung up and perished. Amidst all the crimes and revolutions of the Byzantine government, and its history is but a series of crimes and revolutions, it was never dismembered by intestine war; a sedition in the army, a tumult in the theatre, a conspiracy in the palace, precipitated a monarch from the throne; but the allegiance of Constantinople was instantly transferred to his successor, and the provinces implicitly obeyed the voice of the capital. The custom too of partition, so baneful to the Latin kingdoms, and which was not altogether unknown to the Saracens, never prevailed in the Greek empire. It stood in the middle of the tenth century, as vicious indeed and cowardly, but more wealthy,

* Gibbon, c. 53. Constantine Porphyrogenitus, in his advice to his son as to the administration of the empire, betrays a mind not ashamed to confess weakness and cowardice, and pleasing itself in petty arts to elude the rapacity, or divide the power of its enemies.

more enlightened, and far more secure from its enemies, than under the first successors of Heraclius. For about one hundred years preceding there had been only partial wars with the Mohammedan potentates; and in these, the emperors seem gradually to have gained the advantage, and to have become more frequently the aggressors. But the increasing distractions of the east encouraged two brave usurpers, Nicephorus Phocas and John Zimisces, to attempt the actual recovery of the lost provinces. They carried the Roman eagles (one may use the term with less reluctance than usual) over Syria; Antioch and Aleppo were taken by storm, Damascus submitted; even the cities of Mesopotamia, beyond the ancient boundary of the Euphrates, were added to the trophies of Zimisces, who unwillingly spared the capital of the khalifate. From such distant conquests it was expedient, and indeed necessary, to withdraw; but Cilicia and Antioch were permanently restored to the empire. At the close of the tenth century, the emperors of Constantinople possessed the best and greatest portion of the modern kingdom of Naples, a part of Sicily, the whole European dominions of the Ottomans, the province of Anatolia or Asia Minor, with some part of Syria and Armenia.* 963 - 975

* Gibbon, c. 52 and 53. The latter of these chapters contains as luminous a sketch of the conduction of Greece, as the former does of Saracenic history. In each, the facts are not grouped historically according to the order of time, but philosophically, according to their relations.

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The Turks.

These successes of the Greek empire were certainly much rather due to the weakness of its enemies, than to any revival of national courage and vigour; yet they would probably have been more durable, if the contest had been only with the khalifate, or the kingdoms derived from it. But a new actor was to appear on the stage of Asiatic tragedy. The same Turkish nation, the slaves and captives from which had become arbiters of the sceptre of Bagdad, passed their original limits of the Iaxartes or Sihon. The sultans of Gazna, a dynasty whose splendid conquests were of very short duration, had deemed it politic to divide the strength of these formidable allies, by inviting a part of them into Khorasan. They covered that fertile province with their pastoral tents, and beckoned their compatriots to share the riches of the south. The Gaznevides fell the earliest victims; but Persia, violated in turn by every conqueror, was a tempting and unresisting prey. Togrol Bek, the founder of the Seljukian dynasty of Turks, overthrew the family of Bowides, who had long reigned at Ispahan, respected the pageant of Mohammedan sovereignty in the khalif of Bagdad, embraced with all his tribes the religion of the vanquished, and commenced the attack upon Christendom by an irruption into Armenia. His nephew and successor Alp Arslan defeated and took prisoner the emperor Romanus Diogenes; and the conquest of Asia Minor was almost completed by princes of

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the same family, the Seljukians of Rûm,* who were permitted by Malek Shah, the third sultan of the Turks, to form an independent kingdom. Through their own exertions, and the selfish impolicy of rival competitors for the throne of Constantinople, who bartered the strength of the empire for assistance, the Turks became masters of the Asiatic cities and fortified passes; nor did there seem any obstacle to the invasion of Europe.†

The first Crusades.

In this state of jeopardy, the Greek empire looked for aid to the nations of the west, and received it in fuller measure than was expected, or perhaps desired. The deliverance of Constantinople was indeed a very secondary object with the crusaders. But it was necessarily included in their scheme of operations, which, though they all tended to the recovery of Jerusalem, must commence with the first enemies that lay on their line of march. The Turks were entirely defeated, their capital of Nice restored to the empire. As the Franks passed onwards, the emperor Alexius Comnenus trod on their footsteps, and secured to himself the fruits for which their enthusiasm disdained to wait. He regained possession of the strong places on the Ægean shores, of the defiles of Bithynia, and of the entire coast of Asia Minor, both on the Euxine and Mediterranean seas, which the Turkish armies, composed of cavalry and

* Rûm, i. e. country of the Romans.

† Gibbon, c. 57. De Guignes, Hist. des Huns, t. II. l. 2.

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unused to regular warfare, could not recover.* So much must undoubtedly be ascribed to the first crusade. But I think that the general effect of these expeditions has been over-rated by those who considef them as having permanently retarded the progress of the Turkish power. The Christians in Palestine and Syria were hardly in contact with the Seljukian kingdom of Rûm, the only enemies of the empire; and it is not easy to perceive, that their small and feeble principalities, engaged commonly in defending themselves against the Mohammedan princes of Mesopotamia, or the Fatimite khalifs of Egypt, could obstruct the arms of a sovereign of Iconium upon the Mæander or the Halys. Other causes are adequate to explain the equipoise in which the balance of dominion in Anatolia was kept during the twelfth century; the valour and activity of the two Comneni, John and Manuel, especially the former; and the frequent partitions and internal feuds, through which the Seljukians of Iconium, like all other oriental governments, became incapable of foreign aggression.

Progress of the Greeks.

Capture of Constantinople by the Latins.

But whatever obligation might be due to the first crusaders from the eastern empire was cancelled by their descendants one hundred years afterwards, when the fourth in number of those expeditions was turned to the subjugation of Con-

* It does not seem perfectly clear, whether the sea-coast, north and south, was re-annexed to the empire during the reign of Alexius, or of his gallant son, John Comnenus. But the doubt is hardly worth noticing.

stantinople itself. One of those domestic revolutions, which occur perpetually in Byzantine history, had placed an usurper on the imperial throne. The lawful monarch was condemned to blindness and a prison; but the heir escaped to recount his misfortunes to the fleet and army of crusaders, assembled in the Dalmatian port of Zara. This armament had been collected for the usual purposes, and through the usual motives, temporal and spiritual, of a crusade; the military force chiefly consisted of French nobles, the naval was supplied by the republic of Venice, whose doge commanded personally in the expedition. It was not apparently consistent with the primary object of retrieving the Christian affairs in Palestine, to interfere in the government of a Christian empire; but the temptation of punishing a faithless people, and the hope of assistance in their subsequent operations prevailed. They turned their prows up the Archipelago; and notwithstanding the vast population, and defensible strength of Constantinople, compelled the usurper to fly, and the citizens to surrender. But animosities springing from religious schism and national jealousy were not likely to be allayed by such remedies; the Greeks, wounded in their pride and bigotry, regarded the legitimate emperor as a creature of their enemies, ready to sacrifice their church, a stipulated condition of his restoration, to that of Rome. In a few months a new sedition and conspiracy raised another usurper in defiance of the crusaders' army encamped without the walls,

A.D. 1202

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The siege instantly recommenced; and after three months the city of Constantinople was taken by storm. The tale of pillage and murder is always uniform; but the calamities of ancient capitals, like those of the great, impress us more forcibly. Even now we sympathize with the virgin majesty of Constantinople, decked with the accumulated wealth of ages, and resplendent with the monuments of Roman empire and of Grecian art. Her populousness is estimated beyond credibility: ten, twenty, thirty-fold that of London or Paris; certainly far beyond the united capitals of all European kingdoms in that age.* In magnificence she excelled them more than in numbers; instead of the thatched roofs, the mud walls, the narrow streets, the pitiful buildings of those cities, she had marble and gilded palaces, churches and monasteries, the works of skilful architects, through nine centuries, gradually sliding from the severity of ancient taste into the more various and brilliant combinations of eastern fancy.† In the libraries

* Ville Hardouin reckons the inhabitants of Constantinople at quatre cens mil hommes ou plus, by which Gibbon understands him to mean men of a military age. Le Beau allows a million for the whole population. Gibbon, vol. xi p. 213. We should probably rate London, in 1204, too high at 40,000 souls. Paris had been enlarged by Philip Augustus, and stood on more ground than London. Delamare sur la Police, t. i. p 76.

† O quanta civitas, exclaims Fulk of Chartres a hundred years before, nobilis et decora! quot monasteria, quotque palatia sunt in eâ, opere mero fabrefacta! quot etiam in plateis vel in vicis opera ad spectandum mirabilia! Tedium est quidem magnum recitare, quanta sit ibi opulentia bonorum omnium, auri et argenti, pallionum multiformium, sacrarumque reliquiarum. Omni etiam tempore, navigio frequenti cuncta hominum necessaria illuc afferuntur. Du Chesne, Scrip. Rerum Gallicarum, t. iv. p. 822.

f Constantinople were collected the remains of hrecian learning; her forum and hippodrome ere decorated with those of Grecian sculpture; ut neither would be spared by undistinguishing apine; nor were the chiefs of the crusaders more ble to appreciate the loss than their soldiery. 'our horses, that breathe in the brass of Lysippus, vere removed from Constantinople to the square f St. Mark at Venice; destined again to become he trophies of war, and to follow the alternate evolutions of conquest. But we learn from a ontemporary Greek to deplore the fate of many ther pieces of sculpture, which were destroyed in antonness, or even coined into brass money.*

Partition of the empire.

The lawful emperor and his son had perished in he rebellion that gave occasion to this catastrophe; nd there remained no right to interfere with that f conquest. But the Latins were a promiscuous multitude, and what their independent valour had earned was not to be transferred to a single master. Though the name of emperor seemed necessary for the government of Constantinople, the unity of despotic power was very foreign to the principles and the interests of the crusaders. In their selfish schemes of aggrandizement they tore in pieces the Greek empire. One fourth only was allotted to the emperor, three eighths were the share of the republic of Venice, and the remainder was divided among the chiefs. Baldwin, count of Flanders, obtained the imperial title, with the feudal

* Gibbon, c. 60.

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sovereignty over the minor principalities. A monarchy thus dismembered had little prospect of honour or durability. The Latin emperors of Constantinople were more contemptible and unfortunate, not so much from personal character as political weakness, than their predecessors; their vassals, rebelled against sovereigns not more powerful than themselves; the Bulgarians, a nation, who, after being long formidable, had been subdued by the imperial arms, and only recovered independence on the eve of the Latin conquest, insulted their capital; the Greeks viewed them with silent hatred, and hailed the dawning deliverance from the Asiatic coast. On that side of the Bosporus, the Latin usurpation was scarcely for a moment acknowledged; Nice became the seat of a Greek dynasty, who reigned with honour as far as the Mæander; and crossing into Europe, after having established their dominion throughout Romania and other provinces, expelled the last Latin emperors from Constantinople in less than sixty years from its capture.

The Greeks recover Constantinople.

1261

During the reign of these Greeks at Nice, they had fortunately little to dread on the side of their former enemies, and were generally on terms of friendship with the Seljukians of Iconium. That monarchy indeed had sufficient objects of apprehension for itself. Their own example in changing the upland plains of Tartary for the cultivated vallies of the south was imitated in the thirteenth century by two successive hordes of northern barbarians. The Karismians, whose tents

Invasions of Asia by the Karismians

had been pitched on the lower Oxus and Caspian Sea, availed themselves of the decline of the Turkish power to establish their dominion in Persia, and menaced, though they did not overthrow, the kingdom of Iconium. A more tremendous storm ensued in the irruption of Moguls under the sons of Zingis Khan. From the farthest regions of Chinese Tartary, issued a race more fierce and destitute of civilization than those who had preceded, whose numbers were told by hundreds of thousands, and whose only test of victory was devastation. All Asia, from the sea of China to the Euxine, wasted beneath the locusts of the north. They annihilated the phantom of authority which still lingered with the name of khalif at Bagdad. They reduced into dependence and finally subverted the Seljukian dynasty of Persia, Syria, and Iconium. The Turks of the latter kingdom betook themselves to the mountainous country, where they formed several petty principalities, which subsisted by incursions into the territory of the Moguls or Greeks. The chief of one of these, named Othman, at the end of the thirteenth century, penetrated into the province of Bithynia, from which his posterity were never to withdraw.*

CHAP. VI. GREEKS AND SARACENS. and Moguls. 1218 1272 1299

The empire of Constantinople had never recovered the blow it received at the hands of the Latins. Most of the islands in the Archipelago, and the provinces of proper Greece from Thessaly

Declining state of the Greek empire.

* De Guignes, Hist. des Huns, t. iii. l. 15. Gibbon, c. 64

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southward, were still possessed by those invaders. The wealth and naval power of the empire had passed into the hands of the maritime republics; Venice, Genoa, Pisa, and Barcelona were enriched by a commerce which they carried on as independent states within the precincts of Constantinople, scarcely deigning to solicit the permission or recognize the supremacy of its master. In a great
1352 battle fought under the walls of the city between the Venetian and Genoese fleets, the weight of the Roman empire, in Gibbon's expression, was scarcely felt in the balance of these opulent and powerful republics. Eight gallies were the contribution of the emperor Cantacuzene to his Venetian allies; and upon their defeat he submitted to the ignominy of excluding them for ever from trading in his dominions. Meantime the remains of the empire in Asia were seized by the independent Turkish dynasties, of which the most illustrious, that of the Ottomans, occupied the province of Bithynia. Invited by a Byzantine faction into
1341 Europe, about the middle of the fourteenth century, they fixed themselves in the neighbourhood of the capital, and in the thirty years reign of Amurath I., subdued, with little resistance, the province of Romania, and the small Christian kingdoms that had been formed on the lower Danube. Bajazet, the successor of Amurath, reduced the independent emirs of Anatolia to subjection, and after long threatening Constantinople, invested it by sea and land. The Greeks called
1396 loudly upon their brethren of the west for aid

The Ottomans.

against the common enemy of Christendom; but the flower of French chivalry had been slain or taken in the battle of Nicopolis in Bulgaria,* where the king of Hungary, notwithstanding the heroism of these volunteers, was entirely defeated by Bajazet. The emperor Manuel left his capital with a faint hope of exciting the courts of Europe to some decided efforts, by personal representations of the danger; and, during his absence, Constantinople was saved, not by a friend indeed, but by a power more formidable to her enemies than to herself.

The Tartars or Moguls of Timur.

The loose masses of mankind, that without laws, agriculture, or fixed dwellings, overspread the vast central regions of Asia, have, at various times, been impelled by necessity of subsistence, or through the casual appearance of a commanding genius, upon the domain of culture and civilization. Two principal roads connect the nations of Tartary with those of the west and south; the one into Europe along the sea of Azoph, and northern coast of the Euxine; the other across the interval between the Bukharian mountains and the Caspian into Persia. Four

* The Hungarians fled in this battle, and deserted their allies, according to the Mémoires de Boucicaut, c 25 But Froissart, who seems a fairer authority, imputes the defeat to the rashness of the French. Part iv. ch. 79. The count de Nevers, (Jean Sans Peur, afterwards duke of Burgundy,) who commanded the French, was made prisoners with others of the royal blood, and ransomed at a very high price. Many of eminent birth and merit were put to death; a fate from which Boucicaut was saved by the interference of the count de Nevers, who might better himself have perished with honour on that occasion, than survived to plunge his country into civil war, and his name into infamy.

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times at least within the period of authentic history, the Scythian tribes have taken the former course, and poured themselves into Europe, but each wave was less effectual than the preceding. The first of these was in the fourth and fifth centuries, for we may range those rapidly successive migrations of the Goths and Huns together, when the Roman empire fell to the ground, and the only boundary of barbarian conquest was the Atlantic ocean upon the shores of Portugal. The second wave came on with the Hungarians in the tenth century, whose ravages extended as far as the southern provinces of France. A third attack was sustained from the Moguls under the children of Zingis, at the same period as that which overwhelmed Persia. The Russian monarchy was destroyed in this invasion, and for two hundred years that great country lay prostrate under the yoke of the Tartars. As they advanced, Poland and Hungary gave little opposition; and the farthest nations of Europe were appalled by the tempest. But Germany was no longer as she had been in the anarchy of the tenth century; the Moguls were unused to resistance, and still less inclined to regular warfare; they retired before
1245 the emperor Frederic II., and the utmost points of their western invasion were the cities of Lignitz in Silesia, and Neustadt in Austria. In the fourth and last aggression of the Tartars, their progress in Europe is hardly perceptible; the Moguls of Timur's army could only boast the destruction of Azoph, and the pillage of some

Russian provinces. Timur, the sovereign of these Moguls, and founder of their second dynasty, which has been more permanent and celebrated than that of Zingis, had been the prince of a small tribe, in Transoxiana, between the Gihon and Sirr, the doubtful frontier of settled and pastoral nations. His own energy and the weakness of his neighbours are sufficient to explain the revolution he effected. Like former conquerors, Togrol Bek and Zingis, he chose the road through Persia; and meeting little resistance from the disordered governments of Asia, extended his empire on one side to the Syrian coast, while by successes still more renowned, though not belonging to this place, it reached on the other to the heart of Hindostan. In his old age, the restlessness of ambition impelled him against the Turks of Anatolia. Bajazet hastened from the siege of Constantinople to a more perilous contest: his defeat and captivity, in the plains of Angora, clouded for a time the Ottoman crescent, and preserved the wreck of the Greek empire for fifty years longer.

Defeat of Bajazet 1402

The Moguls did not improve their victory, in the western parts of Asia, as in Hindostan. Timur was but a barbarian destroyer, though at Samarcand a sovereign and a legislator. He gave up Anatolia to the sons of Bajazet; but the unity of their power was broken; and the Ottoman kingdom, like those which had preceded, experienced the evils of partition and mutual animosity. For about twenty years an opportunity was given to the Greeks of recovering part of their losses; but

Danger of Constantinople

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they were incapable of making the best use of this advantage; and though they gained possession of part of Romania, did not extirpate a strong Turkish colony that held the city of Gallipoli in the Chersonesus. When Amurath II., therefore, re-united under his vigorous sceptre the Ottoman monarchy, Constantinople was exposed to another siege and to fresh losses. Her walls, however, repelled the enemy; and during the reign of Amurath she had leisure to repeat those signals of distress, which the princes of Christendom refused to observe. The situation of Europe was, indeed, sufficiently inauspicious: France, the original country of the crusades and of chivalry, was involved in foreign and domestic war; while a schism, apparently interminable, rent the bosom of the Latin church, and impaired the efficiency of the only power that could unite and animate its disciples in a religious war. Even when the Roman pontiffs were best disposed to rescue Constantinople from destruction, it was rather as masters than as allies that they would interfere; their ungenerous bigotry, or rather pride, dictated the submission of her church, and the renunciation of her favourite article of distinctive faith. The Greeks yielded with reluctance and insincerity in the council of Florence; but soon rescinded their treaty of union. Eugenius IV. procured a short diversion on the side of Hungary; but after the unfortunate battle of Warna, the Hungarians were abundantly employed in self-defence.

1421

1444

The two monarchies, which have successively

held their seat in the city of Constantine, may be contrasted in the circumstances of their decline. In the present day we anticipate, with the assurance that none can deem extravagant, the approaching subversion of the Ottoman power; but the signs of internal weakness have not yet been confirmed by the dismemberment of provinces; and the arch of dominion, that long since has seemed nodding to its fall, and totters at every blast of the north, still rests upon the land-marks of ancient conquest, and spans the ample regions from Bagdad to Belgrade. Far different were the events that preceded the dissolution of the Greek empire. Every province was in turn subdued; every city opened her gates to the conqueror; the limbs were lopped off one by one; but the pulse still beat at the heart, and the majesty of the Roman name was ultimately confined to the walls of Constantinople. Before Mahomet II. planted his cannon against them, he had completed every smaller conquest, and deprived the expiring empire of every hope of succour or delay. It was necessary that Constantinople should fall, but the magnanimous resignation of her emperor bestows an honour upon her fall, which her prosperity seldom earned. The long deferred but inevitable moment arrived; and the last of the Cæsars (I will not say of the Palæologi) folded round him the imperial mantle, and remembered the name which he represented in the dignity of heroic death. It is thus that the intellectual principle, when enfeebled by disease or age, is said to rally

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Its fall.

1453

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its energies in the presence of death, and to pour the radiance of unclouded reason around the last struggles of dissolution.

Though the fate of Constantinople had been protracted beyond all reasonable expectation, the actual intelligence operated like that of sudden calamity. A sentiment of consternation, perhaps of self-reproach, thrilled to the heart of Christendom. There seemed no longer any thing to divert the Ottoman armies from Hungary; and if Hungary should be subdued, it was evident that both Italy and the German empire were exposed to invasion.* A general union of Christian powers was required to withstand this common enemy. But the popes, who had so often armed them against each other, wasted their spiritual and political counsels in attempting to restore unanimity. War was proclaimed against the Turks at the diet of Frankfort, in 1454; but no efforts were made to carry the menace into execution. No prince could have sat on the imperial throne more unfitted for the emergency than Frederic III., his mean spirit and narrow capacity exposed him to the contempt of mankind, his avarice and duplicity ensured the hatred of Austria and Hungary. During the papacy of Pius II., whose heart was

Alarm excited by it in Europe.

* Sive vincitur Hungaria, sive cuncta jungitur Turcis, neque Italia neque Germania tuta erit, neque satis Rhenus Gallos securos reddet. Æn. Sylv. p. 678. This is part of a discourse pronounced by Æneas Sylvius before the diet of Frankfort, which, though too declamatory, like most of his writings, is an interesting illustration of the state of Europe, and of the impression produced by that calamity. Spondanus, ad ann. 1454, has given large extracts from this oration.

thoroughly engaged in this legitimate crusade, a more specious attempt was made by convening an European congress at Mantua. Almost all the sovereigns attended by their envoys; it was concluded that 50,000 men at arms should be raised, and a tax levied for three years of one tenth from the revenues of the clergy, one thirtieth from those of the laity, and one twentieth from the capital of the Jews.* Pius engaged to head this armament in person, but when he appeared next year at Ancona, the appointed place of embarkation, the princes had failed in all their promises of men and money, and he found only a headlong crowd of adventurers, destitute of every necessary, and expecting to be fed and paid at the pope's expense. It was not by such a body that Mahomet could be expelled from Constantinople. If the Christian sovereigns had given a steady and sincere co-operation, the contest would still have been arduous and uncertain. In the early crusades, the superiority of arms, of skill, and even of discipline, had been uniformly on the side of Europe. But the present circumstances were far from similar. An institution, begun by the first and perfected by the second Amurath, had given

Institution of Janizaries.

* Spondanus. Neither Charles VII nor even Philip of Burgundy, who had made the loudest professions, and pledged himself in a fantastic pageant at his court soon after the capture of Constantinople to undertake this crusade, was sincere in his promises. The former pretended apprehensions of invasion from England, as an excuse for sending no troops; which, considering the situation of England in 1454, was a bold attempt upon the credulity of mankind.

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to the Turkish armies, what their enemies still wanted, military subordination and veteran experience. Aware, as it seems, of the real superiority of Europeans in war, these sultans selected the stoutest youths from their Bulgarian, Servian, or Albanian captives, who were educated in habits of martial discipline, and formed into a regular force with the name of Janizaries. After conquest had put an end to personal captivity, a tax of every fifth male child was raised upon the Christian population for the same purpose. The arm of Europe was thus turned upon herself; and the western nations must have contended with troops of hereditary robustness and intrepidity, whose emulous enthusiasm for the country that had adopted them was controuled by habitual obedience to their commanders.*

* In the long declamation of Æneas Sylvius before the diet of Frankfort in 1454, he has the following contrast between the European and Turkish militia; a good specimen of the artifice with which an ingenious orator can disguise the truth, while he seems to be stating it most precisely. Conferamus nunc Turcos et vos invicem, et quid agendum sit, si cum illis pugnetis, examinemus. Vos nati ad arma, illi tracti. Vos armati, illi inermes; vos gladios versatis, illi cultris utuntur; vos balistas tenditis, illi arcus trahunt; vos loricæ thoracesque protegunt, illos cilicia tegit, vos equos tegitis, illi ab equis reguntur; vos nobiles in bellum ducitis, illi servi aut artifices cogunt, &c. &c. p. 685. This, however, had little effect upon the hearers, who were better judges of military affairs than the secretary of Frederic III. Pius II., or Æneas Sylvius, was a lively writer and a skilful intriguer. Long experience had given him a considerable insight into European politics; and his views are usually clear and sensible. Though not so learned as some popes, he knew much better what was going forward in his own time. But the vanity of displaying his eloquence betrayed him into a strange folly, when he addressed a very long letter to Mahomet II. explaining the catholic faith, and urging him to be baptized; in which case, so far from preaching a crusade against the Turks, he would gladly make use of their power to recover the rights of the church. Some of his inducements are curious, and must, if made public, have

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Suspension of the Ottoman conquests.

Yet forty years after the fall of Constantinople, at the epoch of Charles VIII.'s expedition into Italy, the just apprehensions of European statesmen might have gradually subsided. Except the Morea, Negropont, and a few other unimportant conquests, no real progress had been made by the Ottomans. Mahomet II. had been kept at bay by the Hungarians; he had been repulsed with some ignominy by the knights of St. John from the island of Rhodes. A petty chieftain defied this mighty conqueror for twenty years in the mountains of Epirus; and the persevering courage of his desultory warfare with such trifling resources, and so little prospect of ultimate success, may justify the exaggerated admiration with which his contemporaries honoured the name of Scanderbeg. Once only the crescent was displayed on the Calabrian coast; but the city of Otranto remained 1480
but a year in the possession of Mahomet. On his death a disputed succession involved his children in civil war. Bajazet, the eldest, obtained the victory; but his rival brother Zizim fled to Rhodes, from whence he was removed to France, and afterwards to Rome. Apprehensions of this exiled prince seem to have dictated a pacific policy to the reigning sultan, whose character did not possess the usual energy of Ottoman sovereigns.

been highly gratifying to his friend, Frederic III. Quippe ut arbitramur, si Christianus fuisses, mortuo Ladislao Ungariæ et Bohemiæ rege, nemo præter te sua regna fuisset adeptus. Spernssent Ungari post diuturna bellorum mala sub tuo regimine pacem, et illos Bohemi secuti fuissent; sed cum esses nostræ religionis hostis, elegerunt Ungari, &c. Epist 396

CHAPTER VII.

HISTORY OF ECCLESIASTICAL POWER DURING THE MIDDLE AGES.

Wealth of the Clergy—its Sources—Encroachments on Ecclesiastical Property—their Jurisdiction—arbitrature—coercive—their Political Power—Supremacy of the Crown—Charlemagne—Change after his death, and Encroachments of the Church in the ninth Century—Primacy of the See of Rome—its early Stage—Gregory I—Council of Frankfort—false Decretals—Progress of Papal Authority—Effects of Excommunication—Lothaire—State of the Church in the Tenth Century—Marriage of Priests—Simony—Episcopal Elections—Imperial Authority over the Popes—Disputes concerning Investitures—Gregory VII. and Henry IV.—Concordat of Calixtus—Election by Chapters—general System of Gregory VII—Progress of Papal Usurpations in the twelfth Century—Innocent III.—his Character and Schemes—continual Progress of the Papacy—Canon Law—Mendicant Orders—dispensing Power—Taxation of the Clergy by the Popes—Encroachments on Rights of Patronage—Mandats, Reserves, &c.—general Disaffection towards the See of Rome in the thirteenth Century—Progress of Ecclesiastical Jurisdiction—Immunity of the Clergy in Criminal Cases—Restraints imposed upon their Jurisdictum—upon their Acquisition of Property—Boniface VIII.—his Quarrel with Philip the Fair—its Termination—gradual Decline of Papal Authority—Louis of Bavaria—Secession to Avignon and Return to Rome—Conduct of Avignon Popes—contested Election of Urban and Cle-

went produces the great Schism—Council of Pisa—Constance—Basle—Methods adopted to restrain the Papal Usurpations in England, Germany, and France—Liberties of the Gallican Church—Decline of the Papal Influence in Italy.

CHAP. VII. ECCLES. POWER.

Wealth of the church under the empire.

At the irruption of the northern invaders into the Roman empire, they found the clergy already endowed with extensive possessions. Besides the spontaneous oblations upon which the ministers of the Christian church had originally subsisted, they had obtained, even under the pagan emperors, by concealment or connivance, for the Roman law did not permit a tenure of lands in mortmain, certain immoveable estates, the revenues of which were applicable to their own maintenance, and that of the poor.* These indeed were precarious, and liable to confiscation in times of persecution. But it was among the first effects of the conversion of Constantine to give not only a security, but a legal sanction to the territorial acquisitions of the church. The edict of Milan, in 313, recognizes the actual estates of ecclesiastical corporations.† Another, published in 321, grants to all the subjects of the empire the power of bequeathing their property to the church.‡ His own liberality and that of his successors set an example which did not want imitators. Passing rapidly from a condition of distress and persecu-

* Giannone, Istoria di Napoli, l. ix. c. 8. Gibbon, c. 15 and c. 20. F. Paul's Treatise on Benefices, c. 4. The last writer does not wholly confirm this position; but a comparison of the three seems to justify my text.

† Giannone. Gibbon, ubi supra. F. Paul, c. 5.

‡ Id. Ibid.

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tion to the summit of prosperity, the church degenerated as rapidly from her ancient purity, and forfeited the respect of future ages in the same proportion as she acquired the blind veneration of her own.* Covetousness, especially, became almost a characteristic vice. Valentinian I. in 370, prohibited the clergy from receiving the bequest of women; a modification more creditable than any general law could have been. And several of the fathers severely reprobate the prevailing avidity of their contemporaries.*

Increased after its subversion.

The devotion of the conquering nations, as it was still less enlightened than that of the subjects of the empire, so was it still more munificent. They left indeed the worship of Hesus and Taranis in their forests; but they retained the elementary principles of that, and of all barbarous idolatry, a superstitious reverence for the priesthood, a credulity that seemed to invite imposture, and a confidence in the efficacy of gifts to expiate offences. Of this temper it is undeniable that the ministers of religion, influenced probably not so much by personal covetousness, as by zeal for the interests of their order, took advantage. Many of the peculiar and prominent characteristics in the faith and discipline of those ages appear to have been either introduced, or sedulously promoted for the purposes of sordid fraud. To those purposes conspired the veneration for relics, the worship of images, the idolatry of saints and

* Giannone, ubi supra. F Paul, c. 6

martyrs, the religious inviolability of sanctuaries, the consecration of cemeteries, but above all, the doctrine of purgatory, and masses for the relief of the dead. A creed thus contrived, operating upon the minds of barbarians, lavish though rapacious, and devout though dissolute, naturally caused a torrent of opulence to pour in upon the church. Donations of land were continually made to the bishops, and, in still more ample proportion, to the monastic foundations. These had not been very numerous in the west till the beginning of the sixth century, when Benedict established his celebrated rule.* A more remarkable show of piety, a more absolute seclusion from the world, forms more impressive and edifying, prayers and masses more constantly repeated, gave to the professed in these institutions a preference over the secular clergy.

The ecclesiastical hierarchy never received any territorial endowment by law, either under the Roman empire, or the kingdoms erected upon its ruins. But the voluntary munificence of princes as well as their subjects amply supplied the place of a more universal provision. Large private estates, or, as they were termed, patrimonies, not only within their own dioceses, but sometimes in distant countries, sustained the dignity of the principal sees, and especially that of Rome.†

* Giannone, l. iii. c. 6; l. iv. c. 12. Treatise on Benefices, c. 8. Fleury, Huitième Discours sur l'Hist. Ecclésiastique. Muratori, Dissert. 65.

† St. Marc t. i. p. 281. Giannone, l. iv. c. 12.

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The French monarchs of the first dynasty, the Carlovingian family and their great chief, the Saxon line of emperors, the kings of England and Leon, set hardly any bounds to their liberality, as numerous charters still extant in diplomatic collections attest. Many churches possessed seven or eight thousand mansi; one with but two thousand passed for only indifferently rich.* But it must be remarked, that many of these donations are of lands uncultivated and unappropriated.† The monasteries acquired legitimate riches by the culture of these deserted tracts, and by the prudent management of their revenues, which were less exposed to the ordinary means of dissipation than those of the laity. Their wealth continually accumulated enabled them to become the regular purchasers of landed estates, especially in the time of the crusades, when the fiefs of the nobility were constantly in the market for sale or mortgage.‡

Sometimes improperly acquired

If the possessions of ecclesiastical communities had all been as fairly earned, we could find nothing in them to reprehend. But other sources of wealth were less pure; and they derived their wealth from many sources. Those who entered into a monastery threw frequently their whole estates into the common stock; and even the children of rich parents were expected to make a donation of land on assuming the cowl. Some gave their

* Schmidt, t. ii. p. 205
† Muratori, Dissert. 65. Du Cange, v. Eremus.
‡ Heeren, Essai sur les Croisades, p. [illegible]. Schmidt, t. iii. p. 293.

property to the church before entering on military expeditions; gifts were made by some to take effect after their lives, and bequests by many in the terrors of dissolution. Even those legacies to charitable purposes, which the clergy could with more decency and speciousness recommend, and of which the administration was generally confined to them, were frequently applied to their own benefit.* They failed not, above all, to inculcate upon the wealthy sinner, that no atonement could be so acceptable to heaven, as liberal presents to its earthly delegates.† To die without allotting a portion of worldly wealth to pious uses was accounted almost like suicide, or a refusal of the last sacraments; and hence intestacy passed for a sort of fraud upon the church, which she punished by taking the administration of the deceased's effects into her own hands. This however was peculiar to England, and seems to have been the case there only between the reigns of Henry III. and Edward III. when the bishop took a portion of the intestate's

* Primo sacris pastoribus data est facultas, ut hæreditatis portio in pauperes et egenos dispergeretur, sed sensim ecclesiæ quoque in pauperum censum venerunt, atque intestate gentis mens credita est proclivior in eas futura fuisse quâ ex re pinguius illarum patrimonium evasit. Immò episcopi ipsi in rem suam ejusmodi consuetudinem interdum convertebant: ac tributum evasit, quod antea pii mortis fuit. Muratori, Antiquitates Italiæ, t. ... Dissert 67

† Muratori, Dissert. 67 (Antiquit Italiæ, t. v. p. 1055) has preserved a curious charter of an Italian count, who declares, that, struck with reflections upon his sinful state, he had taken counsel with certain religious, how he should atone for his offences. Accepto consilio ab iis, excepto si renunciare sæculo possem, nullum esse melius inter eleemosinarum virtutes, quàm si de propriis meis substantiis in monasterium concederem. Hoc consilium ab iis libenter, et ardentissimo animo ego accepi.

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personal estate, for the advantage of the church and poor, instead of distributing it among his next of kin.* The canonical penances imposed upon repentant offenders, extravagantly severe in themselves, were commuted for money or for immoveable possessions; a fertile though scandalous source of monastic wealth, which the popes afterwards diverted into their own coffers, by the usage of dispensations and indulgences.† The church lands enjoyed an immunity from taxes, though not in general from military service, when of a feudal tenure. But their tenure was frequently in what was called frankalmoign, without any obligation of service. Hence it became a customary fraud of lay proprietors to grant estates to the church which they received again by way of fief or lease, exempted from public burthens. And as if all these means of accumulating what they could not legitimately enjoy were insufficient, the monks prostituted their knowledge of writing to the purpose of forging charters in their own favour, which might easily impose upon an ignorant age, since it has required a peculiar science to detect them in modern times. Such rapacity might seem incredible in men cut off from the pursuits of life, and the hope of posterity, if we did not behold every day the unreasonableness of avarice, and the fervour of professional attachment.‡

* Selden, vol. iii p. 1676. Prynne's Constitutions, vol iii p. 18 Blackstone, vol. ii. chap. 32. In France, the lord of the fief seems to have taken the whole spoil. Du Cange, v. Intestatus

† Muratori, Dissert. 68.

‡ Muratori's 65th, 67th, and

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As an additional source of revenue, and in imitation of the Jewish law, the payment of tithes was recommended or enjoined. These however were not applicable at first to the maintenance of a resident clergy. Parochial divisions, as they now exist, did not take place, at least in some countries, till several centuries after the establishment of Christianity.* The rural churches, erected successively as the necessities of a congregation required, or the piety of a landlord suggested, were in fact a sort of chapels dependent on the cathedral, and served by itinerant ministers at the bishop's discretion. The bishop himself received the tithes, and apportioned them as he thought fit. A capitulary of Charlemagne however regulates their division into three parts; one for the bishop and his clergy, a second for the poor, and a third for the support of the fabric of the church.† Some of the rural churches obtained by episcopal concessions the privileges of baptism and burial, which were accompanied with a fixed share of tithes, and seem to imply the residence of a minister. The same privileges were gradually extended to the rest, and thus a complete parochial division

68th Dissertations on the antiquities of Italy have furnished the principal materials of my text, with Father Paul's Treatise on Benefices, especially chaps. 19 and 20; Giannone, loc. cit. and l. iv. c. 12, l. v. c. 6.; l. xxii. 12. Schmidt. Hist. des Allemands, t. i. p. 370., t. ii. p. 203. 463.; t. iv. p. 202. Fleury, III. Discours. sur l'Hist. Eccles. Du Cange, voc. Precaria.

* Muratori, Dissert. 74. and Fleury, Institutions au Droit ecclesiastique, t. i. p. 162. refer the origin of parishes to the fourth century; but this must be limited to the most populous parts of the empire.

† Schmidt, t. ii. p. 206 This seems to have been founded on an ancient canon. F. Paul, c. 7.

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was finally established. But this was hardly the case in England till near the time of the conquest.* The slow and gradual manner in which parochial churches became independent appears to be of itself a sufficient answer to those who ascribe a great antiquity to the universal payment of tithes. There are however more direct proofs that this species of ecclesiastical property was acquired not only by degrees, but with considerable opposition. We find the payment of tithes first enjoined by the canons of a provincial council in France near the end of the sixth century. From the ninth to the end of the twelfth, or even later, it is continually enforced by similar authority.† Father Paul remarks, that most of the sermons preached about the eighth century inculcate this as a duty, and even seem to place the summit of Christian perfection in its performance.‡ This reluctant submission of the people to a general and permanent tribute is perfectly consistent with the eagerness displayed by them in accumulating voluntary donations upon the church. Charlemagne was the first who gave the confirmation of a civil statute to these ecclesiastical injunctions; no one at least has, so far as I know, adduced any earlier law for the payment of tithes than one of his capitularies.§

* Collier's Ecclesiastical History, p. 220.

† Selden's History of Tithes, vol. iii. p. 1108 edit. Wilkins. Tithes are said by Giannone to have been enforced by some papal decrees in the sixth century, l. iii. c. 6.

‡ Treatise on Benefices, c. 11.

§ Mably (Observations sur l'Hist. de France, t. i. p. 238 et 438) has, with remarkable rashness, attacked the current opinion, that Charlemagne established the legal obligation of tithes, and denied that any of his capitularies bear such a

But it would be precipitate to infer, either that the practice had not already gained ground to a considerable extent, through the influence of ecclesiastical authority, or on the other hand, that it became universal in consequence of the commands of Charlemagne.* In the subsequent ages, it was very common to appropriate tithes, which had originally been payable to the bishop, either towards the support of particular churches, or, according to the prevalent superstition, to monastic foundations.† These arbitrary consecrations, though the subject of complaint, lasted, by a sort of prescriptive right of the landholder, till about the year 1200. It was nearly at the same time that the obligation of paying tithes, which had been originally confined to those called predial, or the fruits of the earth, was extended, at least in theory, to every species of profit, and to the wages of every kind of labour.‡

Spoliation of church property.

Yet there were many hinderances that thwarted the clergy in their acquisition of opulence, and a sort of reflux, that set sometimes very strongly against them. In times of barbarous violence,

interpretation. Those which he quotes have indeed a different meaning; but he has overlooked an express enactment in 789, (Baluzii Capitularia, t. i. p. 253) which admits of no question; and I believe that there are others in confirmation.

* The grant of Ethelwolf in 855 seems to be the most probable origin of the right to tithes in England. Whether this law, for such it was, met with constant regard, is another question. It is said by Marina, that tithes were not legally established in Castile till the reign of Alfonso X. Ensayo sobre las siete partidas, c. 359

† Selden, p. 1114. et seq. Coke, 2 Inst. p. 641.

‡ Selden's History of Tithes. Treatise on Benefices, c. 28. Giannone, l. x. c. 12.

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nothing can thoroughly compensate for the inferiority of physical strength and prowess. The ecclesiastical history of the middle ages presents one long contention of fraud against robbery; of acquisitions made by the church through such means as I have described, and torn from her by lawless power. Those very men who, in the hour of sickness and impending death, showered the gifts of expiatory devotion upon her altars, had passed the sunshine of their lives in sacrilegious plunder. Notwithstanding the frequent instances of extreme reverence for religious institutions among the nobility, we should be deceived in supposing this to be their general character. Rapacity, not less insatiable than that of the abbots, was commonly united with a daring fierceness that the abbots could not resist. In every country, we find continual lamentation over the plunder of ecclesiastical possessions. Charles Martel is reproached with having given the first notorious example of such spoliation. It was not, however, commonly practised by sovereigns. But the evil was not the less universally felt. The parochial tithes, especially, as the hand of robbery falls heaviest upon the weak, were exposed to unlawful seizure. In the tenth and eleventh centuries nothing was more common than to see the revenues of benefices in the hands of lay impropriators, who employed curates at the cheapest rate; an abuse that has never ceased in the church.*

* Du Cange, voc. Abbas.

Several attempts were made to restore these tithes; but even Gregory VII. did not venture to proceed in it;* and indeed it is highly probable that they might be held in some instances by a lawful title.† Sometimes the property of monasteries was dilapidated by corrupt abbots, whose acts, however clandestine and unlawful, it was not easy to revoke. And both the bishops and convents were obliged to invest powerful lay protectors, under the name of advocates, with considerable fiefs, as the price of their assistance against depredators. But these advocates became too often themselves the spoilers, and oppressed the helpless ecclesiastics for whose defence they had been engaged.‡

If it had not been for these drawbacks, the clergy must, one would imagine, have almost acquired the exclusive property of the soil. They did enjoy nearly one half of England, and, I believe, a greater proportion in some countries of Europe.§ They had reached, perhaps, their

* Schmidt, t. iv. p. 204. At an assembly held at St Denis in 997, the bishops proposed to restore the tithes to the secular clergy; but such a tumult was excited by this attempt, that the meeting was broken up. Recueil des Historiens, t. xi. prefat. p. 212.

† Selden's Hist. of Tithes, p. 1136. The third council of Lateran restrains laymen from transferring their impropriated tithes to other laymen. Velly, Hist. de France, t. iii. p. 235. This seems tacitly to admit that their possession was lawful, at least by prescription.

‡ For the injuries sustained by ecclesiastical proprietors, see Muratori, Dissert. 72. Du Cange, v. Advocatus. Schmidt, t. ii. p. 220. 470, t. iii. p. 200, t. iv. p. 186. 202. Recueil des Historiens, t. xi. prefat. p. 184. Martenne, Thesaurus Anecdotorum, t. i. p. 595. Vaissette, Hist. de Languedoc, t. ii. p. 109. and Appendix, passim.

§ Turner's Hist. of England, vol. ii. p. 413. from Avesbury. According to a calculation founded on a passage in Knyghton, the revenue of the English church in 1337 amounted to 730,000 marks per annum. Macpherson's Annals of Commerce, vol. i. p. 519. Hist.

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zenith in respect of territorial property about the conclusion of the twelfth century.* After that time the disposition to enrich the clergy by pious donations grew more languid, and was put under certain legal restraints, to which I shall hereafter advert; but they became rather more secure from forcible usurpations.

Ecclesiastical jurisdiction.

The acquisitions of wealth by the church were hardly so remarkable, and scarcely contributed so much to her greatness, as those innovations upon the ordinary course of justice, which fall under the head of ecclesiastical jurisdiction and immunity. It is hardly, perhaps, necessary to caution the reader, that rights of territorial justice, possessed by ecclesiastics in virtue of their fiefs, are by no means included in this description. Episcopal jurisdiction, properly so called, may be considered as depending upon the choice of litigant parties, upon their condition, and upon the subject matter of their differences.

Arbitrative,

1. The arbitrative authority of ecclesiastical pastors, if not coeval with Christianity, grew up very early in the church, and was natural, or even necessary, to an insulated and persecuted society.† Accustomed to feel a strong aversion

toire du Droit public Ecclés. François, t. i. p. 214

* The great age of monasteries in England was the reigns of Henry I., Stephen, and Henry II. Lyttleton's Henry II., vol. ii. p. 329. David I. of Scotland, contemporary with Henry II., was also a noted founder of monasteries. Dalrymple's Annals.

† 1 Corinth, c. iv. The word ἐξουθενημένους, rendered in our version "of no reputation," has been interpreted by some to mean, persons destitute of coercive authority, referees. The passage at least tends to discourage suits before a secular judge.

to the imperial tribunals, and even to consider a recurrence to them as hardly consistent with their profession, the early Christians retained somewhat of a similar prejudice even after the establishment of their religion. The arbitration of their bishops still seemed a less objectionable mode of settling differences. And this arbitrative jurisdiction was powerfully supported by a law of Constantine, which directed the civil magistrate to enforce the execution of episcopal awards. Another edict, ascribed to the same emperor, and annexed to the Theodosian code, extended the jurisdiction of the bishops to all causes which either party chose to refer to it, even where they had already commenced in a secular court, and declared the bishop's sentence not subject to appeal. This edict has clearly been proved to be a forgery. It is evident, by a novel of Valentinian III., about 450, that the church had still no jurisdiction in questions of a temporal nature, except by means of the joint reference of contending parties. Some expressions, indeed, used by the emperor seem intended to repress the spirit of encroachment upon the civil magistrates, which had probably begun to manifest itself. Charlemagne, however, deceived by the spurious constitution in the Theodosian code, repeats all its absurd and enormous provisions in one of his capitularies.* But it appears so inconceivable, that an enlightened sovereign should deliberately

* Baluzii Capitularia, t i. p. 985.

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place in the hierarchy this absolute controul over his own magistrates, that one might be justified in suspecting some kind of fraud to have been practised upon him, or at least that he was not thoroughly aware of the extent of his concession. Certain it is, that we do not find the church, in her most arrogant temper, asserting the full privileges contained in this capitulary.*

coercive over the clergy in civil

2. If it was considered almost as a general obligation upon the primitive Christians to decide their civil disputes by internal arbitration, much more would this be incumbent upon the clergy. The canons of several councils, in the fourth and fifth centuries, sentence a bishop or priest to deposition, who should bring any suit, civil or even criminal, before a secular magistrate. This must, it should appear, be confined to causes where the defendant was a clerk; since the ecclesiastical court had hitherto no coercive jurisdiction over the laity. It was not so easy to induce laymen, in their suits against clerks, to prefer the episcopal tribunal. The emperors were not at all disposed to favour this species of encroachment till the reign of Justinian, who ordered civil suits against ecclesiastics to be carried only before the bishops. Yet this was accompanied by a provision, that a party dissatisfied with the sentence might apply to the secular magistrate, not as an appellant, but a

Gibbon, c. xx. Giannone, l. ii. c. 8, l. iii. c. 6, l. vi. c. 7. Schmidt, t. ii. p. 208. Fleury, 7me Discours, and Institutions au Droit Ecclésiastique, t. ii. p. 1. Mémoires de l'Académie des Inscriptions, t. xxxvii. p. 566.

co-ordinate jurisdiction; for if different judgements were given in the two courts, the process was ultimately referred to the emperor.* But the Merovingian kings adopted the exclusive jurisdiction of the bishop over causes wherein clerks were interested, without any of the checks which Justinian had provided. Many laws enacted during their reigns, and under Charlemagne, strictly prohibit the temporal magistrates from entertaining complaints against the children of the church.

and criminal suits.

This jurisdiction over the civil causes of clerks was not immediately attended with an equally exclusive cognizance of criminal offences imputed to them, wherein the state is so deeply interested, and the church could inflict so inadequate a punishment. Justinian appears to have reserved such offences for trial before the imperial magistrate, though with a material provision that the sentence against a clerk should not be executed without the consent of the bishop, or the final decision of the emperor. The bishop is not expressly invested with this controuling power by the laws of the Merovingians; but they enact that he must be present at the trial of one of his clerks; which probably was intended to declare the necessity of his concurrence in the judgement. The episcopal order was indeed absolutely exempted from secular jurisdiction by Justinian; a privilege which it had vainly endeavoured to establish under the earlier

* This was also established about the same time by Athalaric, king of the Ostrogoths, and of course affected the popes, who were his subjects. St. Marc, t. i. p. 60. Fleury, Hist. Eccles. t. vii. p. 292.

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emperors. France permitted the same immunity; Chilperic, one of the most arbitrary of her kings, did not venture to charge some of his bishops with treason, except before a council of their brethren. Finally, Charlemagne seems to have extended to the whole body of the clergy an absolute exemption from the judicial authority of the magistrate.*

Over particular causes

3. The character of a cause, as well as of the parties engaged, might bring it within the limits of ecclesiastical jurisdiction. In all questions simply religious, the church had an original right of decision; in those of a temporal nature, the civil magistrate had, by the imperial constitutions, as exclusive an authority.† Later ages witnessed strange innovations in this respect, when the spiritual courts usurped, under sophistical pretences, almost the whole administration of justice. But these encroachments were not, I apprehend, very striking till the twelfth century; and as about the same time measures, more or less vigorous and successful, began to be adopted in order to restrain them, I shall defer this part of the subject for the present.

* Mémoires de l'Académie, ubi supra. Giannone, l. iii. c. 6. Schmidt, t. ii p. 236 Fleury, ubi supra.

Some of these writers do not state the law of Charlemagne so strongly. Nevertheless the words of a capitulary in 789, Ut clerici ecclesiastici ordinis si culpam incurrerint, apud ecclesiasticos judicentur, non apud seculares, are sufficiently general: (Baluz. Capitul. t. i. p. 237.) and the same is expressed still more forcibly in the collection published by Ansegisus under Louis the Debonair. (Id. pp. 904. and 1115.) See other proofs in Fleury, Hist. Eccles. t. ix. p. 607.

† Quoties de religione agitur, episcopos oportet judicare; alteras vero causas quæ ad ordinarios cognitores vel ad usum publici juris pertinent, legibus oportet audiri. Lex Arcadii et Honorii, apud Mem. de l'Académie, t. xxix. p. 571.

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In this sketch of the riches and jurisdiction of the hierarchy, I may seem to have implied their political influence, which is naturally connected with the two former. They possessed, however, more direct means of acquiring temporal power. Even under the Roman emperors they had found their road into palaces; they were sometimes ministers, more often secret counsellors, always necessary, but formidable allies, whose support was to be conciliated, and interference to be respected. But they assumed a far more decided influence over the new kingdoms of the west. They were entitled, in the first place, by the nature of those free governments, to a privilege unknown under the imperial despotism, that of assisting in the deliberative assemblies of the nation. Councils of bishops, such as had been convoked by Constantine and his successors, were limited in their functions to decisions of faith, or canons of ecclesiastical discipline. But the northern nations did not so well preserve the distinction between secular and spiritual legislation. The laity seldom, perhaps, gave their suffrage to the canons of the church; but the church was not so scrupulous as to trespass upon the province of the laity. Many provisions are found in the canons of national and even provincial councils, which relate to the temporal constitution of the state. Thus one held at Calcluith, (an unknown place in England,) in 787, enacted that none but legitimate princes should be raised to the throne, and not such as were engendered in adultery or incest. But it is

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to be observed that, although this synod was strictly ecclesiastical, being summoned by the pope's legate, yet the kings of Mercia and Northumberland, with many of their nobles, confirmed the canons by their signature. As for the councils held under the Visigoth kings of Spain during the seventh century, it is not easy to determine whether they are to be considered as ecclesiastical or temporal assemblies.* No kingdom was so thoroughly under the bondage of the hierarchy as Spain.† The first dynasty of France seem to have kept their national convention, called the Field of March, more distinct from merely ecclesiastical councils.

The bishops acquired and retained a great part of their ascendancy by a very respectable instrument of power, intellectual superiority. As they alone were acquainted with the art of writing, they were naturally entrusted with political correspondence, and with the framing of the laws. As they alone knew the elements of a few sciences, the education of royal families devolved upon them as a necessary duty. In the fall of Rome, their influence upon the barbarians wore down the asperities of conquest, and saved the provincials half the shock of that tremendous revolution. As captive Greece is said to have subdued her Roman conqueror, so Rome, in her own turn of servitude, cast the fetters of a moral captivity upon the fierce

* Marina, Teoria de las Cortes, t. i. p. 9.

† See instances of the temporal power of the Spanish bishops in Fleury, Hist. Eccles. t. viii. p. 368. 397; t. ix. p. 88, &c.

invaders of the north. Chiefly through the exertions of the bishops, whose ambition may be forgiven for its effects, her religion, her language, in part even her laws, were transplanted into the courts of Paris and Toledo, which became a degree less barbarous by imitation.*

Supremacy of the state.

Notwithstanding, however, the great authority and privileges of the church, it was decidedly subject to the supremacy of the crown, both during the continuance of the western empire, and after its subversion. The emperors convoked, regulated, and dissolved universal councils; the kings of France and Spain exercised the same right over the synods of their national churches.† The Ostrogoth kings of Italy fixed by their edicts the limits within which matrimony was prohibited on account of consanguinity, and granted dispensations from them.‡ Though the Roman emperors left episcopal elections to the clergy and people of the diocese, in which they were followed by the Ostrogoths and Lombards, yet they often interfered so far as to confirm a decision, or to determine a contest. The kings of France went farther, and seem to have invariably either nominated the

* Schmidt, t. i. p. 365.

† Encyclopédie, art. Concile. Schmidt, t. i. p. 384. De Marca, De Concordantiâ Sacerdotii et Imperii, l. ii. c. 9. 11.; et l. iv. passim.

‡ The last of these sometimes endeavours to extenuate the royal supremacy, but his own work furnishes abundant evidence of it, especially l. vi. c. 19 &c. For the ecclesiastical independence of Spain, down to the eleventh century, see Marina, Ensayo sobre las siete partidas, c. 322 &c.; and De Marca, l. vi. c. 23.

§ Giannone, l. iii. c. 6.

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bishops, or, what was nearly tantamount, recommended their own candidate to the electors.

But the sovereign who maintained with the greatest vigour his ecclesiastical supremacy was Charlemagne. Most of the capitularies of his reign relate to the discipline of the church; principally indeed taken from the ancient canons, but not the less receiving an additional sanction from his authority.* Some of his regulations, which appear to have been original, are such as men of high church principles would, even in modern times, deem infringements of spiritual independence; that no legend of doubtful authority should be read in the churches, but only the canonical books, and that no saint should be honoured whom the whole church did not acknowledge. These were not passed in a synod of bishops, but enjoined by the sole authority of the emperor, who seems to have arrogated a legislative power over the church, which he did not possess in temporal affairs. Many of his other laws relating to the ecclesiastical constitution are enacted in a general council of the lay nobility as well as of prelates, and are so blended with those of a secular nature, that the two orders may appear to have equally consented to the whole. His father Pepin, indeed, left a remarkable precedent in a council held in 744, where the Nicene faith is declared to

* Baluzii Capitularia, passim. Schmidt, t. ii. p. 239. Guillard, Vie de Charlemagne, t. iii.

be established, and even a particular heresy condemned, with the consent of the bishops and nobles. But whatever share we may imagine the laity in general to have had in such matters, Charlemagne himself did not consider even theological decisions as beyond his province; and, in more than one instance, manifested a determination not to surrender his own judgement, even in questions of that nature, to any ecclesiastical authority. CHAP. VII. ECCLES. POWER.

This part of Charlemagne's conduct is duly to be taken into the account, before we censure his vast extension of ecclesiastical privileges. Nothing was more remote from his character than the bigotry of those weak princes, who have suffered the clergy to reign under their names. He acted upon a systematic plan of government, conceived by his own comprehensive genius, but requiring too continual an application of similar talents for durable execution. It was the error of a superior mind, zealous for religion and learning, to believe that men, dedicated to the functions of the one, and possessing what remained of the other, might, through strict rules of discipline, enforced by the constant vigilance of the sovereign, become fit instruments to reform and civilize a barbarous empire. It was the error of a magnanimous spirit to judge too favourably of human nature, and to presume, that great trusts would be fulfilled, and great benefits remembered.

It is highly probable, indeed, that an ambitious

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hierarchy did not endure without reluctance this imperial supremacy of Charlemagne, though it was not expedient for them to resist a prince formidable, and from whom they had so much to expect. But their dissatisfaction at a scheme of government incompatible with their own objects of perfect independence produced a violent recoil under Louis the Debonair, who attempted to act the censor of ecclesiastical abuses with as much earnestness as his father, though with very inferior qualifications for so delicate an undertaking. The bishops accordingly were among the chief instigators of those numerous revolts of his children, which harrassed this emperor. They set, upon one occasion, the first example of an usurpation which was to become very dangerous to society, the deposition of sovereigns by ecclesiastical authority. Louis, a prisoner in the hands of his enemies, had been intimidated enough to undergo a public penance; and the bishops pretended that, according to a canon of the church, he was incapable of returning afterwards to a secular life, or preserving the character of sovereignty.* Cir-

Pretensions of the hierarchy in the ninth century.

* Habitû sæculi se exuens habitum pœnitentis per impositionem manuum episcoporum suscepit, ut post tantam talemque pœnitentiam nemo ultra ad militiam sæcularem redeat. Acta exauctorationis Ludovici, apud Schmidt, t. II. p. 68. There was a sort of precedent, though not, I think, very apposite, for this doctrine of implied abdication, in the case of Wamba, king of the Visigoths in Spain, who, having been clothed with a monastic dress, according to a common superstition, during a dangerous illness, was afterwards adjudged by a council incapable of resuming his crown; to which he voluntarily submitted. The story, as told by an original writer, quoted in Baronius ad A.D. 681, is too obscure to warrant any positive

cumstances enabled him to retain the empire, in defiance of this sentence; but the church had tasted the pleasure of trampling upon crowned heads, and was eager to repeat the experiment. Under the disjointed and feeble administration of his posterity in their several kingdoms, the bishops availed themselves of more than one opportunity to exalt their temporal power. Those weak Carlovingian princes, in their mutual animosities encouraged the pretensions of a common enemy. Thus Charles the Bald, and Louis of Bavaria having driven their brother Lothaire from his dominions, held an assembly of some bishops, who adjudged him unworthy to reign, and, after exacting a promise from the two allied brothers to govern better than he had done, permitted and commanded them to divide his territories.* After concurring in this unprecedented encroachment, Charles the Bald had little right to complain when, some years afterwards, an assembly of bishops declared himself to have forfeited his crown, released his subjects from their allegiance, and transferred his kingdom to Louis of Bavaria. But, in truth, he did not pretend to deny the principle which he had contributed to maintain. Even in his own

inference, though I think we may justly suspect a fraudulent contrivance between the bishops and Ervigius the successor of Wamba. The latter, besides his monastic attire, had received the last sacrament; after which he might be deemed civilly dead. Fleury, 3me Discours sur l'Hist. Ecclésiast. puts this case too strongly, when he tells us, that the bishops *deposed* Wamba; it may have been a voluntary abdication, influenced by superstition, or, perhaps, by disease.

* Schmidt, t. ii. p. 77. Velly, t. ii. p. 611 see too, p. 74.

CHAP. VII. himself, he did not appeal to the rights of sovereigns, and of the nation whom they represent. "No one," says this degenerate grandson of Charlemagne, "ought to have degraded me from the throne to which I was consecrated, until at once I had been heard and judged by the bishops, through whose ministry I was consecrated, who are called the thrones of God, in which God sitteth, and by whom he dispenses his judgments; to whose paternal chastisement I was willing to submit, and do still submit myself."*

These passages are very remarkable, and afford a decisive proof that the power obtained by national churches, through the superstitious prejudices then received, and a train of favourable circumstances, was as dangerous to civil government, as the subsequent usurpations of the Roman pontiff, against which Protestant writers are apt too exclusively to direct their animadversions. Voltaire, I think, has remarked, that the ninth century was the age of the bishops, as the eleventh and twelfth were of the popes. It seemed as if Europe was about to pass under as absolute a domination of the hierarchy, as had been exercised by the priesthood of ancient Egypt, or the druids of Gaul. There is extant a remarkable instrument, recording the election of Boson, king of Arles, by which the bishops alone appear to have elevated him to the throne, without any concur-

* Schmidt, ubi supra, 317. Voltaire, Vellv. Gaillard, &c.

rence of the nobility.* But it is inconceivable that such could have really been the case; and if the instrument is genuine, we must suppose it to have been framed in order to countenance future pretensions. For the clergy, by their exclusive knowledge of Latin, had it in their power to mould the language of public documents for their own purposes; a circumstance which should be cautiously kept in mind when we peruse instruments drawn up during the dark ages.

It was with an equal defiance of notorious truth, that the bishop of Winchester, presiding as papal legate at an assembly of the clergy in 1141, during the civil war of Stephen and Matilda, asserted the right of electing a king of England to appertain principally to that order; and by virtue of this unprecedented claim raised Matilda to the throne.† England, indeed, has been obsequious, beyond most other countries, to the arrogance of her hierarchy; especially during the Anglo-Saxon period, when the nation was sunk in ignorance and effeminate superstition. Everyone knows the story of King Edwy, in some form or other, though I believe it impossible to ascertain the real circumstances of that controverted anecdote. But, upon the supposition least favourable to the king, the behaviour of Archbishop Odo and St.

* Recueil des Historiens, t. ix. p. 304.

† Ventilata est causa, says the Legate, coram majori parte cleri Angliæ, ad cujus jus potissimùm spectat principem eligere, simul-que ordinare. Invocatâ itaque primò in auxilium divinitate, filiam pacifici [illegible], &c. in Anglia Normannisque dominam eligimus, et ei fidem et ministerium promittimus. Gul. Malmsb. p. 196.

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Dunstan was an intolerable outrage of spiritual tyranny.*

Rise of the papal power. Its commencement.

But while the prelates of these nations, each within his respective sphere, were prosecuting their system of encroachment upon the laity, a new scheme was secretly forming within the bosom of the church, to enthral both that and the temporal governments of the world under a single ecclesiastical monarch. Long before the earliest epoch that can be fixed for *modern* history, and, indeed, to speak fairly, almost as far back as ecclesiastical testimonies can carry us, the bishops of Rome had been venerated as first in rank among

* Two living writers of the Roman Catholic communion, Dr Milner, in his History of Winchester, and Mr. Lingard, in his Antiquities of the Anglo-Saxon church, contend that Elgiva, whom some Protestant historians are willing to represent as the queen of Edwy, was but his mistress; and seem ingenious to justify the conduct of [illegible] and Dunstan towards this unfortunate couple. They are unquestionably so far right, that few, if any, of those writers, who have been quoted as authorities in respect of this story, speak of the lady as a queen or lawful wife. I must, therefore, strongly reprobate the conduct of Dr Henry, who, calling Elgiva queen, and asserting that she was married, refers, at the bottom of his page, to William of Malmesbury, and other chroniclers, who give a totally opposite account; especially as he does not intimate, by a single expression, that the nature of her connexion with the king was equivocal. Such a practice, when it proceeds, as I fear it did in this instance, not from oversight, but from prejudice, is a glaring violation of historical integrity, and tends to render the use of references, that great improvement of modern history, a sort of fraud upon the reader. But the fact itself, one certainly of little importance, is, in my opinion, not capable of being proved or disproved. The authorities, as they are called, that is, the passages in monkish writers which mention this transaction, are neither sufficiently circumstantial, nor consistent, nor impartial, nor contemporaneous, to afford ground for rational belief; or at least, there must always remain a strong shade of uncertainty. And it is plain, that different reports of the story prevailed, so as to induce some to imagine, that there were two Elgivas, one queen, the other concubine. But the monkish chroniclers, [illegible] credite, are not entitled to much deference.

the rulers of the church. The nature of this primacy is doubtless a very controverted subject. It is, however, reduced by some moderate Catholics to little more than a precedency attached to the see of Rome in consequence of its foundation by the chief of the apostles, as well as the dignity of the imperial city.* A sort of general superintendence was admitted as an attribute of this primacy, so that the bishops of Rome were entitled, and indeed bound, to remonstrate, when any error or irregularity came to their knowledge, especially in the western churches, a greater part of which had been planted by them, and were connected, as it were by filiation, with the common capital of the Roman empire and of Christendom†. Various causes had a tendency to prevent the bishops of Rome from augmenting their authority

* These foundations of the Roman primacy are indicated by Valentinian III., a great favourer of that see, in a novel of the year 455. Cum igitur sedis apostolicæ primatum B. Petri meritum, qui est princeps sacerdotalis coronæ, et Romanæ dignitas civitatis, sacra etiam synodi firmavit auctoritas. The last words allude to the sixth canon of the Nicene council, which establishes, or recognizes, the patriarchal supremacy, in their respective districts, of the churches of Rome, Antioch, and Alexandria. De Marca, de Concordantiâ Sacerdotii et Imperii, l. i. c. 8. At a much earlier period, Irenæus rather vaguely, and Cyprian more positively, admit, or rather assert, the primacy of the church of Rome, which the latter seems even to have considered as a kind of centre of Catholic unity, though he resisted every attempt of that church to arrogate a controuling power. See his treatise De Unitate Ecclesiæ.

† Dupin, De antiquâ Ecclesiæ Disciplinâ, p. 306. et seqq. Histoire du Droit public ecclésiastique François, p. 149. The opinion of the Roman see's supremacy, though apparently rather a vague and general notion, as it still continues in those Catholics who deny its infallibility, seems to have prevailed very much in the fourth century. Fleury brings remarkable proofs of this from the writings of Socrates, Sozomen, Ammianus Marcellinus, and Optatus. Hist. Eccléss. tom. iii. p. 282. 320. 449.; t. iv. p. 227.

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in the east, and even to diminish that which they had occasionally exercised; the institution of patriarchs at Antioch, Alexandria, and afterwards at Constantinople, with extensive rights of jurisdiction; the difference of rituals and discipline; but above all, the many disgusts taken by the Greeks, which ultimately produced an irreparable schism between the two churches in the ninth century. But within the pale of the Latin church, every succeeding age enhanced the power and dignity of the Roman see. By the constitution of the church, such at least as it became in the fourth century, its divisions being arranged in conformity to those of the empire, every province ought to have its metropolitan, and every vicariate its ecclesiastical exarch or primate. The bishop of Rome presided, in the latter capacity, over the Roman vicariate, comprehending southern Italy, and the three chief Mediterranean islands. But, as it happened, none of the ten provinces forming this division had any metropolitan; so that the popes exercised all metropolitical functions within them, such as the consecration of bishops, the convocation of synods, the ultimate decision of appeals, and many other sorts of authority. These provinces are sometimes called the Roman patriarchate; the bishop of Rome having always been reckoned one, generally indeed the first, of the patriarchs; each of whom was at the head of all the metropolitans within his limits, but without exercising those privileges which by the ecclesiastical constitution appertained to the latter. Though the Roman

Patriarchate of Rome.

patriarchate, properly so called, was comparatively very small in extent, it gave its chief, for the reason mentioned, advantages in point of authority which the others did not possess.*

I may perhaps appear to have noticed circumstances interesting only to ecclesiastical scholars. But it is important to apprehend this distinction of the patriarchate from the primacy of Rome, because it was by extending the boundaries of the former, and by applying the maxims of her administration in the south of Italy to all the western churches, that she accomplished the first object of her scheme of usurpation, in subverting the provincial system of government under the metropolitans. Their first encroachment of this kind was in the province of Illyricum, which they annexed in a manner to their own patriarchate, by not permitting any bishops to be consecrated without their consent.† This was before the end of the fourth century. Their subsequent advances were, however, very gradual. About the middle of the sixth century, we find them confirming the elections of archbishops of Milan.‡ They came by

* Dupin, De antiquâ Eccles. Disciplinâ, p. 39, &c. Giannone, Ist di Napoli, l. n. c. 8; l. iii. c. 6. De Marca, l. i. c. 7. et alibi. There is some disagreement among these writers as to the extent of the Roman patriarchate, which some suppose to have even at first comprehended all the western churches, though they admit that, in a more particular sense, it was confined to the vicariate of Rome.

† Dupin, p. 66. Fleury, Hist. Eccles. t. v. p. 373. The ecclesiastical province of Illyricum included Macedonia. Siricius, the author of this encroachment, seems to have been one of the first usurpers. In a letter to the Spanish bishops, (A. D. 375.) he exalts his own authority very high. De Marca, l. i. c. 8.

‡ St. Marc, t. i. p. 139. 153.

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* Dupin, p. 109. De Marca, l. vi. c. 14. These canons have been questioned, and Dupin does not seem to lay much stress on their authority, though I do not perceive that either he, or Fleury, (Hist Eccles t. m. p. 372.) doubts their genuineness. Sardica was a city of Illyricum, which the translator of Mosheim has confounded with Sardes.

Consultations, or references to the bishop of Rome, in difficult cases of faith or discipline, had been common in early ages, and were even made by provincial and national councils. But these were also made to other bishops, eminent for personal merit, or the dignity of their sees. The popes endeavoured to claim this as a matter of right Innocent I. asserts (A D 402) that he was to be consulted, quoties Dei ratio ventilatur; and Gelasius (A. D. 492.) quantum ad religionem pertinet, non nisi apostolicæ sedi, juxtà canones, debetur summa judicii totius. As the oak is in the acorn, so did these maxims contain the system of Bellarmine. De Marca, l. i. c. 10.; and l. vii. 12. Dupin.

† Some bishops belonging to the province of Hilary, metropolitan of Arles, appealed from his sentence to Leo, who not only entertained their appeal, but presumed to depose Hilary. This assumption of power would have had little effect, if it had not been seconded by the emperor in very unguarded language; hoc perenni sanctione decernimus, ne quid tam episcopis Gallicanis, quam aliarum provinciarum, contra consuetudinem veterem liceat sine auctoritate viri venerabilis papæ urbis æternæ tentare; sed illis omnibusque pro lege sit, quidquid sanxit vel sanxerit apostolicæ sedis auctoritas. De Marca, De Concordantiâ Sacerdotii et Imperii, l. i. c 8 The same emperor enacted, that any bishop who refused to attend the tribunal of the pope when summoned, should be compelled by the governor of his province; ut quisquis episcoporum ad judicium Romani episcopi evocatus venire neglexerit, per moderatorem ejusdem provinciæ adesse cogatur. Id.

metropolitans were not inclined to surrender their prerogatives; and upon the whole, the papal authority had made no decisive progress in France, or perhaps any where beyond Italy, till the pontificate of Gregory I. CHAP. VII.

This celebrated person was not distinguished by learning, which he affected to depreciate; nor by his literary performances, which the best critics consider as below mediocrity, but by qualities more necessary for his purpose, intrepid ambition and unceasing activity. He maintained a perpetual correspondence with the emperors and their ministers, with the sovereigns of the western kingdoms, with all the hierarchy of the catholic church; employing, as occasion dictated, the language of devotion, arrogance, or adulation.* Claims hitherto disputed, or half preferred, assumed under his hands a more definite form; and nations too ignorant to compare precedents or discriminate principles, yielded to assertions confidently made by the authority which they most respected. Gregory dwelt more than his predecessors upon the power of the keys, exclusively or at least principally committed to St. Peter, which had been supposed in earlier times, as it is now by the Gallican catho- Gregory I. 590—604

l. vii. c. 13. Dupin, De Ant. Discipl. p. 29. et 171.

* The flattering style in which this pontiff addressed Brunehaut and Phocas, the most flagitious monsters of his time, is mentioned in all civil and ecclesiastical histories. Fleury quotes a remarkable letter to the patriarchs of Antioch and Alexandria, wherein he says that St. Peter has one see, divided into three, Rome, Antioch and Alexandria; stooping to this absurdity, and inconsistence with his real system, in order to conciliate their alliance against his more immediate rival, the patriarch of Constantinople. Hist. Eccles. t. viii. p. 124.

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lieu, to be inherent in the general body of bishops, joint sharers of one indivisible episcopacy. And thus the patriarchal rights, being manifestly of mere ecclesiastical institution, were artfully confounded, or as it were merged, in the more paramount supremacy of the papal chair. From the time of Gregory, the popes appear in a great measure to have thrown away that scaffolding, and relied in preference on the pious veneration of the people, and on the opportunities which might occur for enforcing their dominion with the pretence of divine authority.*

It cannot, I think, be said, that any material acquisitions of ecclesiastical power were obtained by the successors of Gregory for nearly one hundred and fifty years.† As none of them possessed

* Gregory seems to have established the appellant jurisdiction of the see of Rome, which had been long in suspense. Stephen, a Spanish bishop, having been deposed, appealed to Rome. Gregory sent a legate to Spain, with full powers to confirm or rescind the sentence. He says in his letter on this occasion; à sede apostolicâ, quæ omnium ecclesiarum caput est, causa hæc audienda ac dirimenda fuerat. De Marca, l. vii. c. 18. In writing to the bishops of France, he enjoins them to obey Virgilius bishop of Arles, whom he has appointed his legate in France, secundùm antiquam consuetudinem; so that if any contention should arise in the church, he may appease it by his authority, ad vicegerent of the apostolic see: auctoritatis suæ vigore, vicibus nempe apostolicæ sedis functus, discretâ moderatione compescat. Gregorii Opera, t. ii. p. 783. (edit Benedict.) Dupin, p. 34. Pasquier, Recherches de la France, l. iii. c. 9.

† I observe that some modern publications annex considerable importance to a supposed concession of the title of Universal Bishop, made by the emperor Phocas in 606 to Boniface III., and even appear to date the papal supremacy from this epoch. Those who have imbibed this notion may probably have been misled by a loose expression in Mosheim's Ecclesiastical History, vol. ii. p. 169; though the general tenor of that passage by no means gives countenance to their opinion. But there are several strong objections to our considering this as a leading fact, much less as marking an æra in the history of the papacy.

vigour and reputation equal to his own, it might even appear that the papal influence was retrograde. But in effect the principles which supported it were taking deeper root, and acquiring strength by occasional, though not very frequent

1. Its truth, as commonly stated, appears more than questionable. The Roman pontiffs, Gregory I. and Boniface III. had been vehemently opposing the assumption of this title by the patriarch of Constantinople, not as due to themselves, but as one to which no bishop could legitimately pretend. There would be something almost ridiculous in the emperor's immediately conferring an appellation on themselves, which they had just disclaimed; and though this objection would not stand against evidence, yet when we find no better authority quoted for the fact than Baronius, who is no authority at all, it retains considerable weight. And indeed the want of early testimony is so decisive an objection to any alledged historical fact, that but for the strange prepossessions of some men, one might rest the case here. Fleury takes no notice of this part of the story, though he tell us that Phocas compelled the patriarch of Constantinople to resign his title. 2. But if the strongest proof could be advanced for the authenticity of this circumstance, we might well deny its importance. The concession of Phocas could have been of no validity in Lombardy, France and other western countries, where nevertheless the papal supremacy was incomparably more established than in the east. 3. Even within the empire, it could have had no efficacy after the violent death of that usurper, which followed soon afterwards. 4. The title of Universal Bishop is not very intelligible; but whatever it meant, the patriarchs of Constantinople had borne it before, and continued to bear it ever afterwards. (Dupin, De Antiquâ Disciplinâ, p 329.) 5. The preceding popes, Pelagius II. and Gregory I., had constantly disclaimed the appellation, though it had been adopted by some towards Leo the Great in the council of Chalcedon; (Fleury, t. viii. p. 95.) nor does it appear to have been retained by the successors of Boniface, at least for some centuries. It is even laid down in the decretum of Gratian, that the pope is not styled universal: Nec etiam Romanus pontifex universalis appellatur; (p. 303. edit. 1591.) though some refer its assumption to the ninth century. Nouveau Traite de Diplomatique, t. v. p. 93. In fact it has never been an usual title. 6. The popes had unquestionably exercised a species of supremacy for more than two centuries before this time, which had lately reached a high point of authority under Gregory I. The rescript of Valentinian III., in 455, quoted in a former note, would certainly be more to the purpose than the letter of Phocas. 7. Lastly, there are no sensible marks of this supremacy making a more rapid progress for a century and a half after the pretended grant of that emperor.

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exercise. Appeals to the pope were sometimes made by prelates dissatisfied with a local sentence; but his judgement of reversal was not always executed, as we perceive by the instance of Bishop Wilfrid.* National councils were still convoked by princes, and canons enacted under their authority by the bishops who attended. Though the church of Lombardy was under great subjection during this period, yet those of France, and even of England, planted as the latter had been by Gregory, continued to preserve a tolerable measure of independence.† The first striking infringement of this was made through the influence of an Englishman, Winfrid, better known as St. Boniface, the apostle of Germany. Having undertaken the conversion of Thuringia, and other still heathen countries, he applied to the pope for a commission, and was consecrated bishop without any determinate see. Upon this occasion he took an oath of obedience, and became ever afterwards a zealous upholder of the apostolical chair. His success in the conversion of Germany was great, his reputation eminent, which enabled him to effect a material revolution in ecclesiastical government. Pelagius II. had, about 580, sent a pallium, or vest peculiar to metropolitans, to the

St. Boniface.

* I refer to the English historians for the history of Wilfrid, which neither altogether supports, nor much impeaches, the independency of our Anglo-Saxon church in 700; a matter hardly worth so much contention as Usher and Stillingfleet seem to have thought. The consecration of Theodore by Pope Vitalian in 668 is a stronger fact, and cannot be got over by those injudicious protestants, who take the bull by the horns.

† Schmidt, t. i. p. 366. 394.

bishop of Arles, perpetual vicar of the Roman see in Gaul.* Gregory I. had made a similar present to other metropolitans. But it was never supposed that they were obliged to wait for this favour before they received consecration, until a synod of the French and German bishops, held at Frankfort in 742 by Boniface, as legate of Pope Zachary. It was here enacted, that, as a token of their willing subjection to the see of Rome, all metropolitans should request the pallium at the hands of the pope, and obey his lawful commands.† This was construed by the popes to mean a promise of obedience before receiving the pall, which was changed in aftertimes by Gregory VII. into an oath of fealty.‡

Synod of Frankfort.

* Ut ad instar suum, in Galliarum partibus primi sacerdotis locum obtineat, et quidquid ad gubernationem vel dispensationem ecclesiastici status gerendum est, servatis patrum regulis, et sedis apostolicæ constitutis, faciat. Præterea, pallium illi concedit, &c. Dupin, p. 34. Gregory I. confirmed this vicariat to Virgilius, bishop of Arles, and gave him the power of convoking synods. De Marca, l. vi. c. 7.

† Decrevimus, says Boniface, in nostro synodali conventu, et confessi sumus fidem catholicam, et unitatem et subjectionem Romanæ ecclesiæ fine tenus servare, S. Petro et vicario ejus velle subjici, metropolitanos pallia ab illâ sede quærere, et, per omnia, præcepta S. Petri canonicè sequi. De Marca, l. vi. c. 7. Schmidt, t. i. p. 424. 438. 446. This writer justly remarks the obligation which Rome had to St. Boniface, who anticipated the system of Isidore. We have a letter from him to the English clergy, with a copy of canons passed in one of his synods, for the exaltation of the apostolic see, but the church of England was not then inclined to acknowledge so great a supremacy in Rome. Collier's Eccles. History, p. 128.

In the eighth general council, that of Constantinople in 872, this prerogative of sending the pallium to metropolitans was not only confirmed to the pope, but extended to the other patriarchs, who had every disposition to become as great usurpers as their more fortunate elder brother.

‡ De Marca, ubi supra. Schmidt, t. ii. p. 262. According to the latter, this oath of fidelity was exacted in the ninth century; which is very probable, since Gregory VII. himself did but fill up the sketch which Nicolas I. and John VIII. had delineated. I have

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This council of Frankfort claims a leading place as an epoch in the history of the papacy. Several events ensued, chiefly of a political nature, which rapidly elevated that usurpation almost to its greatest height. Subjects of the throne of Constantinople, the popes had not as yet interfered, unless by mere admonition, with the temporal magistrate. The first instance, wherein the civil duties of a nation and the rights of a crown appear to have been submitted to his decision, was in that famous reference as to the deposition of Childeric. It is impossible to consider this in any other light than as a point of casuistry laid before the first religious judge in the church. Certainly the Franks who raised the king of their choice upon their shields never dreamed that a foreign priest had conferred upon him the right of governing. Yet it was easy for succeeding advocates of Rome to construe this transaction very favourably for its usurpation over the thrones of the earth.*

I shall but just glance at the subsequent political revolutions of that period; the invasion of Italy by Pepin, his donation of the exarchate to the Holy See, the conquest of Lombardy by Charlemagne, the patriciate of Rome conferred upon both these princes, and the revival of the Western Empire in the person of the latter. These events had a natural tendency to exalt the papal supremacy, which

since found this confirmed by Gratian, p. 308.

* Eginhard says, that Pepin was made king per *auctoritatem* Romani pontificis; an ambiguous word, which may rise to *command*, or sink to *advice*, according to the disposition of the interpreter.

it is needless to indicate. But a circumstance of a very different nature contributed to this in a still greater degree. About the conclusion of the eighth century, there appeared, under the name of one Isidore, an unknown person, a collection of ecclesiastical canons, now commonly denominated the False Decretals.* These purported to be rescripts or decrees of the early bishops of Rome; and their effect was to diminish the authority of metropolitans over their suffragans, by establishing an appellant jurisdiction of the Roman See in all causes, and by forbidding national councils to be holden without its consent. Every bishop, according to the decretals of Isidore, was amenable only to the immediate tribunal of the pope; by which one of the most ancient rights of the provincial synod was abrogated. Every accused person might not only appeal from an inferior sentence, but remove an unfinished process before the supreme pontiff. And the latter, instead of directing a revision of the proceedings by the original judges, might

False Decretals.

* The æra of the False Decretals has not been precisely fixed; they have seldom been supposed, however, to have appeared much before 800. But there is a genuine collection of canons published by Adrian I. in 785, which contain nearly the same principles, and many of which are copied by Isidore, as well as Charlemagne in his Capitularies. De Marca, l. vii. c. 20. Giannone, l. v. c. 6. Dupin, De Antiquâ Disciplinâ, p. 133. Fleury, Hist. Eccles. t. ix. p. 500. seems to consider the decretals as older than this collection of Adrian; but I have not observed the same opinion in any other writer. The right of appeal from a sentence of the metropolitan deposing a bishop to the Holy See is positively recognized in the Capitularies of Louis the Debonair; (Baluze, p. 1000.) the three last books of which, according to the collection of Ansegisus, are said to be apostolicâ auctoritate roborata, quia his cudendis maximè apostolica interfuit legatus. p. 1132.

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annul them by his own authority; a strain of jurisdiction beyond the canons of Sardica, but certainly warranted by the more recent practice of Rome. New sees were not to be erected, nor bishops translated from one see to another, nor their resignations accepted, without the sanction of the pope. They were still indeed to be consecrated by the metropolitan, but in the pope's name. It has been plausibly suspected that these decretals were forged by some bishop, in jealousy or resentment; and their general reception may at least be partly ascribed to such sentiments. The archbishops were exceedingly powerful, and might often abuse their superiority over inferior prelates; but the whole episcopal aristocracy had abundant reason to lament their acquiescence in a system of which the metropolitans were but the earliest victims. Upon these spurious decretals was built the great fabric of papal supremacy over the different national churches; a fabric which has stood after its foundation crumbled beneath it; for no one has pretended to deny, for the last two centuries, that the imposture is too palpable for any but the most ignorant ages to credit.*

* I have not seen any account of the decretals so clear and judicious as in Schmidt's History of Germany, t. ii. p. 249. Indeed all the ecclesiastical part of that work is executed in a very superior manner. See also De Marca, l. iii. c. 5.; l. vii. c. 20. The latter writer, from whom I have derived much information, is by no means a strenuous adversary of ultra-montane pretensions. In fact, it was his object to please both in France and at Rome, to become both an archbishop and a cardinal. He failed nevertheless of the latter hope; it being impossible at that time (1650) to satisfy the papal court, without sacrificing altogether the Gallican church and the crown.

The Gallican church made for some time a spirited, though unavailing struggle against this rising despotism. Gregory IV., having come into France to abet the children of Louis the Debonair in their rebellion, and threatened to excommunicate the bishops who adhered to the emperor, was repelled with indignation by those prelates. If he comes here to excommunicate, said they, he shall depart hence excommunicated.* In the subsequent reign of Charles the Bald, a bold defender of ecclesiastical independence was found in Hincmar, archbishop of Rheims, the most distinguished statesman of his age. Appeals to the pope even by ordinary clerks had become common, and the provincial councils, hitherto the supreme spiritual tribunal, as well as legislature, were falling rapidly into decay. The frame of church government, which had lasted from the third or fourth century, was nearly dissolved; a refractory bishop was sure to invoke the supreme court of appeal, and generally met there with a more favourable judicature. Hincmar, a man equal in ambition, and almost in public estimation, to any pontiff, sometimes came off successfully in his contentions with Rome.† But time is fatal to the unanimity of coalitions; the French bishops were accessible to superstitious

* De Marca, l. iv. c. 11. Velly, &c.

† De Marca, l. iv. c. 68, &c.; l. vi. c. 14. 28.; l. vii. c. 21. Dupin, p. 133. &c. Hist. du Droit Eccles François, p. 188. 224. Velly, &c. Hincmar however was not consistent; for having obtained the see of Rheims in an equivocal manner, he had applied for confirmation at Rome, and in other respects impaired the Gallican rights. Pasquier, Recherches de la France, l. iii. c. 12.

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prejudice, to corrupt influence, to mutual jealousy. Above all, they were conscious, that a persuasion of the pope's omnipotence had taken hold of the laity. Though they complained loudly, and invoked, like patriots of a dying state, names and principles of a freedom that was no more, they submitted almost in every instance to the continual usurpations of the Holy See. One of those, which most annoyed their aristocracy, was the concession to monasteries of exemption from episcopal authority. These had been very uncommon till about the eighth century, after which they were studiously multiplied.* It was naturally a favourite object with the abbots; and sovereigns, in those ages of blind veneration for monastic establishments, were pleased to see their own foundations rendered, as it would seem, more respectable by privileges of independence. The popes had a

* The earliest instance of a papal exemption is in 646, which indeed is a respectable antiquity. Others scarcely occur till the pontificate of Zachary in the middle of the eighth century, who granted an exemption to Monte Casino, ita ut nullius juri subjaceat, nisi solius Romani pontificis. See this discussed in Giannone, l. v. c. 6. Precedents for the exemption of monasteries from episcopal jurisdiction occur in Marculfus's forms, compiled towards the end of the seventh century; but these were by royal authority. The kings of France were supreme heads of their national church. Schmidt, t. i. p. 382. De Marca, l. iii. c. 16. Fleury, Institutions au Droit, t. i. p. 228. Muratori, Dissert. 70 (t. iii. p. 404.) Italian is of opinion that exemptions of monasteries from episcopal visitation did not become frequent in Italy till the eleventh century, and that many charters of this kind are forgeries. It is held also by some English antiquaries, that no Anglo-Saxon monastery was exempt, and that the first instance is that of Battle Abbey under the Conqueror, the charters of an earlier date having been forged. Hody on Convocations, p. 20. and 170. It is remarkable that this grant is made by William, and confirmed by Lanfranc. Collier, p. 256. Exemptions became very usual in England afterwards. Henry, vol. v. p. 337.

closer interest in granting exemptions, which attached to them the regular clergy, and lowered the dignity of the bishops. In the eleventh and twelfth centuries, whole orders of monks were declared exempt at a single stroke; and the abuse began to awaken loud complaints, though it did not fail to be aggravated afterwards.

and upon civil communities

The principles of ecclesiastical supremacy were readily applied by the popes to support still more insolent usurpations. Chiefs by divine commission of the whole church, every earthly sovereign must be subject to their interference. The bishops indeed had, with the common weapons of their order, kept their own sovereigns in check, and it could not seem any extraordinary stretch in their supreme head to assert an equal prerogative. Gregory IV., as I have mentioned, became a party in the revolt against Louis I., but he never carried his threats of excommunication into effect. The first instance, where the Roman pontiffs actually tried the force of their arms against a sovereign, was the excommunication of Lothaire, king of Lorraine, and grandson of Louis the Debonair. This prince had repudiated his wife, upon unjust pretexts, but with the approbation of a national council, and had subsequently married his concubine. Nicholas I., the actual pope, dispatched two legates to investigate this business, and decide according to the canons. They hold a council at Metz, and confirm the divorce and marriage. Enraged at this conduct of his ambassadors, the pope summons a council at Rome, annuls the sentence, deposes

Lothaire

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the archbishops of Treves and Cologne, and dispose the [illegible] discard his mistress. After some shuffling on the part of Lothaire, he is [illegible] ceased; and, in a short time, we find both the king and his prelates, who [illegible] begun with expressions of passionate contempt towards the pope, suing humbly for absolution at the feet of Adrian II. successor of Nicholas, which was not granted without difficulty. In all its most impudent pretensions, the Holy See has attended to the circumstances of the time. Lothaire had powerful neighbours, the kings of France and Germany, eager to invade his dominions on the first intimation from Rome; while the real scandalousness of his behaviour must have intimidated his conscience, and disgusted his subjects.

Excommunications.

Excommunication, whatever opinions may be entertained as to its religious efficacy, was originally nothing more in appearance than the exercise of a right which every society claims, the expulsion of refractory members from its body. No direct temporal disadvantages attended this penalty for several ages; but as it was the most severe of spiritual censures, and tended to exclude the object of it not only from a participation in religious rites, but, in a considerable degree, from the intercourse of Christian society, it was used sparingly, and upon the gravest occasions. Gradually, as the church became more powerful and more imperious, excommunications were issued upon every provocation, rather as a weapon of ecclesiastical warfare, than with any regard to its

original intention.) There was evidently much CHAP. pretext for many of these censures, and they were XX. means of defence within the reach of the clergy, when their possessions were lawlessly violated. Others were founded upon the necessity of enforcing their contentious jurisdiction, which, while it was rapidly extending itself over almost all persons and causes, had not acquired any proper coercive process. The spiritual courts in England, whose jurisdiction is so multifarious, and, in general, so little of a religious nature, had till lately no means even of compelling an appearance, much less of enforcing a sentence, but by excommunication.† Princes, who felt the inadequacy of their own laws to secure obedience, called in the assistance of more formidable sanctions. Several capitularies of Charlemagne denounce the penalty of excommunication against incendiaries, or deserters from the army. Charles the Bald procured similar censures against his revolted vassals. Thus the boundary between temporal and spiritual offences grew every day less distinct; and the clergy were encouraged to fresh encroachments, as they discovered the secret of rendering them successful.‡

The civil magistrate ought undoubtedly to protect the just rights and lawful jurisdiction of the

* Schmidt, t. iv. p. 217. Fleury, Institutions au Droit, t. ii. p. 192.

† By a recent statute, 53 G. III. c. 127. the writ De excommunicato capiendo, as in process in contempt, was abolished in England, but retained in Ireland.

‡ Muratori, Antiq. dei Impegni, t. xxiii. p. 246, &c.

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church. It is not so evident that he should attach temporal penalties to her censures. Excommunication has never carried such a presumption of moral turpitude, as to disable a man, upon any solid principles, from the usual privileges of society. Superstition and tyranny however decided otherwise. The support due to church censures by temporal judges is vaguely declared in the capitularies of Pepin and Charlemagne. It became, in later ages, a more established principle in France and England, and, I presume, in other countries. By our common law, an excommunicated person is incapable of being a witness, or of bringing an action; and he may be detained in prison until he obtains absolution. By the establishments of St. Louis, his estate, or person, might be attached by the magistrate.* These actual penalties were attended by marks of abhorrence and ignominy still more calculated to make an impression on ordinary minds. They were to be shunned, like men infected with leprosy, by their servants, their friends, and their families. Two attendants only, if we may trust a current history, remained with Robert king of France, who, on account of an irregular marriage, was put to this ban by Gregory V.; and these threw all the meats which had passed his

* Ordonnances des Rois, t. i. p. 121. But an excommunicated person might sue in the lay, though not in the spiritual, court. No law seems to have been so severe in this respect as that of England, though it is not strictly accurate to say with Dr. Cosens, (Gibson's Codex, p. 1102.) that the writ De excommunicato capiendo is a privilege peculiar to the English church.

table into the fire.* Indeed the mere intercourse with a proscribed person incurred what was called the lesser excommunication, or privation of the sacraments, and required penitence and absolution. In some places, a bier was set before the door of an excommunicated individual, and stones thrown at his windows; a singular method of compelling his submission.† Every where, the excommunicated were debarred of a regular sepulture, which, though obviously a matter of police, has, through the superstition of consecrating burial-grounds, been treated as belonging to ecclesiastical controul. Their carcasses were supposed to be incapable of corruption, which seems to have been thought a privilege unfit for those who had died in so irregular a manner.‡

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But as excommunication, which attacked only one and perhaps a hardened sinner, was not always efficacious, the church had recourse to a more comprehensive punishment. For the offence of a nobleman, she put a county, for that of a prince, his entire kingdom, under an interdict or suspension of religious offices. No stretch of her tyranny was perhaps so outrageous as this. During an interdict, the churches were closed, the bells silent, the dead unburied, no rite but those of baptism and extreme unction performed. The penalty

Interdicts.

* Velly, t. ii.

† Vaissette, Hist. de Languedoc, t. iii. Appendix, p. 359. Du Cange, v. Excommunicatio.

‡ Du Cange, v. Imbiocatus where several authors are referred to, for the constant opinion among the members of the Greek church, that the bodies of excommunicated persons remain in statu quo.

CHAP. XVI. fell upon those who had neither partaken nor could have prevented the offence; and the offence was often but a private dispute, in which the pride of a pope or bishop had been wounded. Interdicts were so rare before the time of Gregory VII., that some have referred them to him as their author; instances may however be found of an earlier date, and especially that which accompanied the above-mentioned excommunication of Robert king of France. They were afterwards issued not unfrequently against kingdoms; but in particular districts they continually occurred.

EFFECTS. POWER.

This was the main spring of the machinery that the clergy set in motion, the lever by which they moved the world. From the moment that these interdicts and excommunications had been tried, the powers of the earth might be said to have existed only by sufferance. Nor was the validity of such denunciations supposed to depend upon their justice. The imposer indeed of an unjust excommunication was guilty of a sin; but the party subjected to it had no remedy but submission. He who disregards such a sentence, says Beaumanoir, renders his good cause bad.† And indeed, without annexing so much importance to the direct consequences of an ungrounded censure, it is evident, that the received theory of religion concerning the indispensable obligation and mysterious efficacy of

* Giannone, l. vii. c. 1. Schmidt, vi. p. 535. Fleury, Institutions, iv. p. 220. Dupin, De antiquâ Eccl. Disciplinâ, p. 268. St. Marc. t. ii. p. 304. † p. 261.

the rites of communion and confession must have induced scrupulous minds to make any temporal sacrifice rather than incur their privation. One is rather surprized at the instances of failure, than of success in the employment of these spiritual weapons against sovereigns, or the laity in general. It was perhaps a fortunate circumstance for Europe, that they were not introduced, upon a large scale, during the darkest ages of superstition. In the eighth or ninth centuries they would probably have met with a more implicit obedience. But after Gregory VII., as the spirit of ecclesiastical usurpation became more violent, there grew up by slow degrees an opposite feeling in the laity, which ripened into an alienation of sentiment from the church, and a conviction of that sacred truth, which superstition and sophistry have endeavoured to eradicate from the heart of man, that no tyrannical government can be founded on a divine commission. CHAP. VII. ECCLES. POWER.

Excommunication had very seldom, if ever, been levelled at the head of a sovereign, before the instance of Lothaire. His ignominious submission, and the general feebleness of the Carlovingian line, produced a repetition of the menace at least, and in cases more evidently beyond the cognizance of a spiritual authority. Upon the death of this Lothaire, his uncle Charles the Bald, having possessed himself of Lorraine, to which the Emperor Louis II. had juster pretensions, the pope Adrian II. warned him to desist, declaring Further usurpation of the popes.

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that any attempt upon that country would bring down the penalty of excommunication. Sustained by the intrepidity of Hincmar, the king did not exhibit his usual pusillanimity, and the pope, in this instance, failed of success.* But John VIII. the next occupier of the chair of St. Peter, carried his pretensions to a height which none of his predecessors had reached. The Carlovingian princes had formed an alliance against Boson, the usurper of the kingdom of Arles. The pope writes to Charles the Fat: I have adopted the illustrious prince Boson as my son; be content therefore with your own kingdom; for I shall instantly excommunicate all who attempt to injure my son.† In another letter to the same king, who had taken some property from a convent, he enjoins him to restore it within sixty days, and to certify by an envoy that he had obeyed the command; else an excommunication would immediately ensue, to be followed by still severer castigation, if the king should not repent upon the first punishment.‡ These expressions seem to intimate a sentence of deposition from his throne, and thus anticipate by two hundred years the famous æra of Gregory VII. at which we shall soon arrive. In some respects, John VIII. even advanced pretensions beyond those of Gregory. He asserts very plainly a right of chusing the emperor, and may seem indirectly

* De Marca, l. iv. c. 11.
† Schmidt, t. ii. p. 260.
‡ Durorubus denuncia se eum te verberibus crudelissimis Schmidt, p. 312.

to have exercised it in the election of Charles the Bald, who had not primogeniture in his favour.* This prince, whose restless ambition was united with meanness as well as insincerity, consented to sign a capitulation on his coronation at Rome, in favour of the pope and church, a precedent which was improved upon in subsequent ages.† Rome was now prepared to rivet her fetters upon sovereigns, and at no period have the condition of society and the circumstances of civil government been so favourable for her ambition. But the consummation was still suspended, and even her progress arrested, for more than a hundred and fifty years. This dreary interval is filled up, in the annals of the papacy, by a series of revolutions and crimes. Six popes were deposed, two murdered, one mutilated. Frequently two or even three competitors, among whom it is not always possible by any genuine criticism to distinguish the true shepherd, drove each other alternately from the city. A few respectable names appear thinly scattered through this darkness; and sometimes, perhaps, a pope who had acquired estimation by his private virtues may be distinguished by some encroachment on the rights of princes, or the privileges of national churches. But in general the pontiffs of that age had neither leisure nor capacity to perfect the great system of

Their degeneracy in the tenth century.

* Baluz. Capitularia 251. Schmidt, t. ii. p.

† Id. p 199.

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temporal supremacy, and looked rather to a vile profit from the sale of episcopal confirmations, or of exemptions to monasteries.*

Corruption of morals.

The corruption of the head extended naturally to all other members of the church. All writers concur in stigmatizing the dissoluteness and neglect of decency that prevailed among the clergy. Though several codes of ecclesiastical discipline had been compiled by particular prelates, yet neither these nor the ancient canons were much regarded. The bishops, indeed, who were to enforce them, had most occasion to dread their severity. They were obtruded upon their sees, as the supreme pontiffs were upon that of Rome, by force or corruption. A child of five years old was made archbishop of Rheims. The see of Narbonne was purchased for another at the age of ten.† By this relaxation of morals the priesthood began to lose its hold upon the prejudices of mankind. These are nourished chiefly indeed by shining examples of piety and virtue, but also, in a superstitious age, by ascetic observances, by the fasting and watching of monks and hermits; who have obviously so bad a lot in this life, that men are induced to conclude, that they must have secured a better reversion in futurity. The regu-

* Schmidt, t. ii. p. 414. Mosheim. St. Marc. Muratori, Ann. d'Italia, passim.

† Vaissette, Hist. de Languedoc, t. ii. p. 252. It was almost general in the church to have bishops under twenty years old. Id. p. 149. Even the pope Benedict IX. is said to have been only twelve, but this has been doubted.

lar clergy accordingly, or monastic orders, who practised, at least apparently, the specious impostures of self-mortification, retained at all times a far greater portion of respect than ordinary priests, though degenerated themselves, as was admitted, from their primitive strictness.

Neglect of rules of celibacy.

Two crimes, or at least violations of ecclesiastical law, had become almost universal in the eleventh century, and excited general indignation; the marriage or concubinage of priests, and the sale of benefices. By an effect of those prejudices in favour of austerity, to which I have just alluded, celibacy had been, from very early times, enjoined as an obligation upon the clergy. Some of the fathers permitted those already married for the first time, and to a virgin, to retain their wives after ordination, as a kind of indulgence of which it was more laudable not to take advantage; and this, after prevailing for a length of time in the Greek church, was sanctioned by the council of Trullo in 691,* and has ever since continued one of the distinguishing features of its discipline. The Latin church, however, did not receive these canons; and has uniformly persevered in excluding the three orders of priests, deacons, and subdeacons, not only from contract-

* This council was held at Constantinople in the dome of the palace, called Trullus, by the Latins. The word Trullo, though solecistical, is used, I believe, by ecclesiastical writers in English St Marc, t. i p. 294. Art de vérifier les Dates, t. i p. 157. Fleury, Hist Eccles. t ix p. 110. Bishops are not within this permission, and cannot retain their wives by the discipline of the Greek church.

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ing matrimony, but from cohabiting with wives espoused before their ordination. The prohibition however, during some ages, existed only in the letter of her canons.* In every country the secular or parochial clergy kept women in their houses, upon more or less acknowledged terms of intercourse, by a connivance of their ecclesiastical superiors, which almost amounted to a positive toleration. The sons of priests were capable of inheriting by the law of France, and also of Castile.† Some vigorous efforts had been made in England by Dunstan with the assistance of King Edgar to dispossess the married canons, if not the parochial clergy, of their benefices; but the abuse, if such it is to be considered, made incessant progress, till the middle of the eleventh century. There was certainly much reason for the rulers of the church to restore this part of their discipline, since it is by cutting off her members from the charities of domestic life, that she secures their entire affection to her cause, and renders them, like veteran soldiers, independent of every feeling

* This prohibition is sometimes repeated in Charlemagne's capitularies, but I have not observed that he notices its violation as a notorious abuse. It is probable, therefore, that the open concubinage or marriage of the clergy was not general until a later period. And Fleury declares, that he has found no instance of it before 893, in the case of a parish priest at Chalons, who gave great scandal by publicly marrying Hist. Eccles. t. xi. p. 594.

† Recueil des Historiens, t. xi. preface Marina, Ensayo sobre las siete partidas, c. 221. 223. This was by virtue of the general indulgence shown by the customs of that country to concubinage, or *barragana*, the children of such an union always inheriting in default of those born in solemn wedlock. Ibid.

but that of fidelity to their commander, and regard to the interests of their body. Leo IX. accordingly, one of the first pontiffs who retrieved the honour of the apostolic chair, after its long period of ignominy, began in good earnest the difficult work of enforcing celibacy among the clergy.* His successors never lost sight of this essential point of discipline. It was a struggle against the natural rights and strongest affections of mankind, which lasted for several ages, and succeeded only by the toleration of greater evils than those it was intended to remove. The laity, in general, took part against the married priests, who were reduced to infamy and want, or obliged to renounce their dearest connexions. In many parts of Germany, no ministers were left to perform divine services.† But perhaps there was no country where the rules of celibacy met with so little attention as in England. It was acknowledged in the reign of Henry I. that the greater and better part of the clergy were married; and that prince is said to have permitted them to retain their wives.‡ But the hierarchy never relaxed

* St Marc, t. iii p 152. 164 219. 602. &c.

† Schmidt, t. iii p 279 Martenne, Thesaurus Anecdotorum, t i. p. 230 A Danish writer draws a still darker picture of the tyranny exercised towards the married clergy, which, if he does not exaggerate, was severe indeed: "alii membris truncabantur, alii occidebantur, alii de patriâ expellebantur, pauci sua retinuere. Langebek, Script. Rerum Danicarum, t i p 380 The prohibition was repeated by Waldemar II in 1222, so that there seems to have been much difficulty found Id p 267. and p 272.

‡ Wilkins, Concilia, p. 387. Chronicon Saxon Collier, p 248. 286. 294 Lyttleton, vol iii. p 328 The third Lateran council

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in their efforts; and all the councils, general or provincial, of the twelfth century, utter denunciations against *concubinary* priests.* After that age we do not find them so frequently mentioned; and the abuse by degrees, though not suppressed, was reduced within limits at which the church might connive.

Simony.

Simony, or the corrupt purchase of spiritual benefices, was the second characteristic reproach of the clergy in the 11th century. The measures taken to repress it deserve particular consideration, as they produced effects of the highest importance in the history of the middle ages. According to the primitive custom of the church, an episcopal vacancy was filled up by election of the clergy

Episcopal elections.

fifty years afterwards speaks of the detestable custom of keeping concubines long used by the English clergy. Cum in Anglia prava et detestabili consuetudine et longo tempore fuerit obtentum, ut clerici in domibus suis fornicarias habeant Labbé, Concilia, t x p 1633 Lugenius IV sent a legate to impose celibacy on the Irish clergy. Lyttleton's Henry II. vol ii. p 42 8vo

* Quidam sacerdotes Latini, says Innocent III, in domibus suis habent concubinas, et nonnulli aliquas sibi non metuunt desponsare Opera Innocent III p. 558. See also p. 300 and 407. The latter cannot be supposed a very common case, after so many prohibitions; the more usual practice was to keep a female in their houses, under some pretence of relationship or servitude, as is still said to be usual in Catholic countries Du Cange, v Focaria. A writer of respectable authority asserts, that the clergy frequently obtained a bishop's licence to cohabit with a mate. Harmer's [Wharton's] Observations on Burnet, p 11 I find a passage in Nicolas de Clemangis about 1400 quoted in Lewis's life of Pecock, p 30 Plerasque in diocesibus, rectores parochiarum ex certo et conducto cum his prælatis pretio, passim et publicè concubinas tenent. This, however, does not amount to a direct licence

The marriages of English clergy are noticed and condemned in some provincial constitutions of 1237 Matt Paris, p 381. And there is, even so late as 1404, a mandate by the bishop of Exeter against married priests. Wilkins, Concilia, t. iii. p 277.

and people belonging to the city or diocese. The subject of their choice was, after the establishment of the federate or provincial system, to be approved or rejected by the metropolitan and his suffragans; and, if approved, he was consecrated by them.* It is probable that, in almost every case, the clergy took a leading part in the selection of their bishops; but the consent of the laity was absolutely necessary to render it valid.† They were however by degrees excluded from any real participation, first in the Greek, and finally in the western church. But this was not effected till pretty late times; the people fully preserved their elective rights at Milan in the eleventh century; and traces of their concurrence may be found both in France and Germany in the next age.‡

It does not appear that the early Christian emperors interposed with the freedom of choice any farther than to make their own confirmation necessary in the great patriarchal sees, such as Rome and Constantinople, which were frequently the objects of violent competition, and to decide in controverted elections.§ The Gothic and Lombard kings of Italy followed the same line of con-

* Marca, De Concordantia, &c. l. vi. c. 2.

† Father Paul on Benefices, c. 7.

‡ De Marca, ubi supra. Schmidt, t. iv. p. 173. The form of election of a bishop of Puy, in 1063, runs thus. clerus, populus, et militia eligimus. Vaissette, Hist de Languedoc, t. ii. Appendix, p. 220. Even Gratian seems to admit in one place, that the laity had a sort of share, though no decisive voice, in filling up an episcopal vacancy. Electio clericorum est, petitio plebis. Decret. l. i. distinctio 62. And other subsequent passages confirm this.

§ Gibbon, c. 20. St. Marc, Abrégé Chronologique, t. i. p. 7.

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duct.* But in the French monarchy a more extensive authority was assumed by the sovereign. Though the practice was subject to some variation, it may be said generally, that the Merovingian kings, the line of Charlemagne, and the German emperors of the house of Saxony, conferred bishoprics either by direct nomination, or, as was more regular, by recommendatory letters to the electors.† In England also, before the conquest, bishops were appointed in the wittenagemot; and even in the reign of William, it is said that Lanfranc was raised to the see of Canterbury by consent of parliament.‡ But, independently of this prerogative, which length of time and the tacit sanction of the people had rendered unquestionably legitimate, the sovereign had other means of controuling the election of a bishop. Those estates and honours which compose the temporalities of the see, and without which the naked spiritual privileges would not have tempted an avaricious generation, bred

* Fra Paolo on Benefices, c. ix. Giannone, l. iii. c. 6, l. iv. c. xii. St Marc, t. i. p. 37.

† Schmidt, t. i. p. 386; t. ii. p. 245. 487. This interference of the kings was perhaps not quite conformable to their own laws, which only reserved to them the confirmation. Episcopo decedente, says a constitution of Clotaire II. in 615, in loco ipsius, qui a metropolitano ordinari debet, a provincialibus, a clero et populo eligatur: et si persona condigna fuerit, per ordinationem principis ordinetur. Baluz. Capitul. t. i. p. 2. Charlemagne is said to have adhered to this limitation, leaving elections free, and only approving the person, and conferring investiture on him. I. Paul. on Benefices, c. xv. But a more direct influence was restored afterwards. Ivon, bishop of Chartres, about the year 1100, thus concisely expresses the several parties concurring in the creation of a bishop: eligente clero, suffragante populo, *dono regis*, per manum metropolitani, approbante Romano pontifice. Du Chesne, Script. Rerum Gallicarum, t. iv. p. 174.

‡ Lyttleton's Hist. of Henry II. vol. iv. p. 144.

Investitures.

chiefly been granted by former kings, and were assimilated to lands held on a beneficiary tenure. As they seemed to partake of the nature of fiefs, they required similar formalities; investiture by the lord, and an oath of fealty by the tenant. Charlemagne is said to have introduced this practice; and, by way of visible symbol, as usual in feudal institutions, to have put the ring and crosier into the hands of the newly consecrated bishop. And this continued for more than two centuries afterwards without exciting any scandal or resistance.

The church has undoubtedly surrendered part of her independence in return for ample endowments and temporal power; nor could any claim be more reasonable, than that of feudal superiors to grant the investiture of dependent fiefs. But the fairest right may be sullied by abuse; and the sovereigns, the lay-patrons, the prelates of the tenth and eleventh centuries made their powers of nomination and investiture subservient to the grossest rapacity.† According to the ancient canons, a benefice was avoided by any simoniacal payment or stipulation. If these were to be enforced, the church must almost be cleared of its ministers. Either through bribery in places where elections still prevailed, or through corrupt agree-

* De Marca, p. 410. Giannone, l. vi. c. 7.

† Boniface, marquis of Tuscany, father of the countess Matilda, and by far the greatest prince in Italy, was flogged before the altar by an abbot, for selling benefices. Muratori, ad ann. 1046. The offence was much more common than the punishment, but the two combined furnish a good specimen of the eleventh century.

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ments with princes, or, at least, customary presents to their wives and ministers, a large proportion of the bishops had no valid tenure in their sees. The case was perhaps worse with inferior clerks: in the church of Milan, which was notorious for this corruption, not a single ecclesiastic could stand the test, the archbishop exacting a price for the collation of every benefice.*

Imperial confirmation of popes.

The bishops of Rome, like those of inferior sees, were regularly elected by the citizens, laymen as well as ecclesiastics. But their consecration was deferred until the popular choice had received the sovereign's sanction. The Romans regularly dispatched letters to Constantinople or to the exarchs of Ravenna, praying that their election of a pope might be confirmed. Exceptions, if any, are infrequent while Rome was subject to the eastern empire.† This, among other imperial prerogatives, Charlemagne might consider as his own. He possessed the city, especially after his coronation as emperor, in full sovereignty; and even before that event, had investigated, as supreme chief, some accusations preferred against the pope Leo III. No vacancy of the papacy took place after Charlemagne became emperor; and it must be confessed, that, in the first which happened under Louis the

* St. Marc, t. iii. p. 65 188. 219. 296 330 368 Muratori, A. D. 958 1057. &c. Fleury, Hist. Eccles. t. xiii. p. 73. The sum however appears to have been very small: rather like a fee than a bribe.

† Le Blanc, Dissertation sur l'Autorité des Empereurs. This is subjoined to his Traité des Monnoyes; but not in all copies, which makes those that want it less valuable. St. Marc and Muratori, passim.

Deponair, Stephen IV. was consecrated in haste without that prince's approbation.* But Gregory IV., his successor, waited till his election had been confirmed; and, upon the whole, the Carlovingian emperors, though less uniformly than their predecessors, retained that mark of sovereignty.† But during the disorderly state of Italy which followed the last reigns of Charlemagne's posterity, while the sovereignty and even the name of an emperor were in abeyance, the supreme dignity of Christendom was conferred only by the factious rabble of its capital. Otho the Great, in receiving the imperial crown, took upon him the prerogatives of Charlemagne. There is even extant a decree of Leo VIII., which grants to him and his successors the right of naming future popes. But the authenticity of this instrument is denied by the Italians.‡ It does not appear that the Saxon emperors went to such a length as nomination, except in one instance; (that of Gregory V. in 996;) but they sometimes, not uniformly, confirmed the election of a pope, according to ancient custom. An explicit right of nomination was however conceded to the emperor Henry III. in 1047, as the only means of rescuing the Roman church from

* Muratori, A. D. 817. St. Marc.

† Le Blanc. Schmidt, t. II. p. 186. St. Marc, t. I. p. 387. 393. &c.

‡ St. Marc had defended the authenticity of this instrument in a separate dissertation, t. IV. p. 1167., though admitting some interpolations. Pagi, in Baronium, t. IV. p. 8. seemed to me to have urged some weighty objections; and Muratori, Annali d'Italia, A.D. 962. speaks of it as a gross imposture, in which he probably goes too far. It obtained credit rather early, and is admitted into the decretum of Gracian, notwithstanding its obvious tendency. p. 211. edit. 1591.

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the disgrace and depravity into which it had fallen. Henry appointed two or three very good popes; acting in this against the warnings of a selfish policy, as fatal experience soon proved to his family

This high prerogative was perhaps not designed to extend beyond Henry himself. But, even if it had been transmissible to his successors, the infancy of his son Henry IV. and the factions of that minority precluded the possibility of its exercise. Nicolas II. in 1059, published a decree, which restored the right of election to the Romans; but with a remarkable variation from the original form. The cardinal bishops (seven in number, holding sees in the neighbourhood of Rome, and consequently suffragans of the pope as patriarch or metropolitan) were to choose the supreme pontiff, with the concurrence first of the cardinal priests and deacons, (or ministers of the parish churches of Rome,) and afterwards of the laity. Thus elected, the new pope was to be presented for confirmation to Henry, "now king and hereafter to become emperor," and to such of his successors as should personally obtain that privilege.† This decree is the foundation of that celebrated mode of election in a conclave of cardinals which has ever since determined the headship of the church. It was intended not only to exclude the citizens,

Decree of Nicolas II

* St. Marc. Muratori. Schmidt. Struvius.

† St. Marc, t. iii p 276. The first canon of the third Lateran council makes the consent of two thirds of the college necessary for a pope's election. Labbé, Concilia, t. x. p. 1508.

who had indeed justly forfeited their primitive right, but as far as possible to prepare the way for an absolute emancipation of the papacy from the imperial controul; reserving only a precarious and personal concession to the emperors, instead of their ancient legal prerogative of confirmation.

Gregory VII. 1073.

The real author of this decree, and of all other vigorous measures adopted by the popes of that age, whether for the assertion of their independence, or the restoration of discipline, was Hildebrand, archdeacon of the church of Rome, by far the most conspicuous person of the eleventh century. Acquiring by his extraordinary qualities an unbounded ascendancy over the Italian clergy, they regarded him as their chosen leader, and the hope of their common cause. He had been empowered singly to nominate a pope, on the part of the Romans, after the death of Leo IX., and compelled Henry III. to acquiesce in his choice of Victor II.* No man could proceed more fearlessly towards his object than Hildebrand, nor with less attention to conscientious impediments. Though the decree of Nicolas II., his own work, had expressly reserved the right of confirmation of the young king of Germany, yet on the death of that pope, Hildebrand procured the election and consecration of Alexander II. without waiting for any authority.† During this pontificate, he was considered as something greater than the pope, who acted entirely by his counsels. On Alexander's

* St. Marc, p. 97. † Id. p. 306.

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His differences with Henry IV.

decease, Hildebrand, long since the real head of the church, was raised with enthusiasm to its chief dignity, and assumed the name of Gregory VII.

Notwithstanding the late precedent at the election of Alexander II., it appears that Gregory did not yet consider his plans sufficiently mature to throw off the yoke altogether, but declined to receive consecration until he had obtained the consent of the king of Germany.* This moderation was not of long continuance. The situation of Germany speedily afforded him an opportunity of displaying his ambitious views. Henry IV., through a very bad education, was arbitrary and dissolute; the Saxons were engaged in a desperate rebellion; and secret disaffection had spread among the princes to an extent of which the pope was much better aware than the king.† He began by excommunicating some of Henry's ministers on pretence of simony, and made it a ground of remonstrance, that they were not instantly dismissed. His next step was to publish a decree, or rather to renew one of Alexander II., against lay investitures.‡ The abolition of these was a favourite object of Gregory, and formed an essential part of his general scheme for emancipating the spiritual, and subjugating the temporal power. The ring and crosier, it was asserted by the papal advocates,

* St. Marc, p 552 He acted however as pope, corresponding in that character with bishops of all countries, from the day of his election. p. 554.

† Schmidt. St. Marc. These two are my principal authorities for the contest between the church and the empire.

‡ St. Marc, t. iii p. 670.

were the emblems of that power which no monarch could bestow; but even if a less offensive symbol were adopted in investitures, the dignity of the church was lowered, and her purity contaminated, when her highest ministers were compelled to solicit the patronage or the approbation of laymen. Though the estates of bishops might, strictly, be of temporal right, yet as they had been inseparably annexed to their spiritual office, it became just that what was first in dignity and importance should carry with it those accessary parts. And this was more necessary than in former times, on account of the notorious traffic which sovereigns made of their usurped nomination to benefices, so that scarcely any prelate sat by their favour whose possession was not invalidated by simony.

The contest about investitures, though begun by Gregory VII., did not occupy a very prominent place during his pontificate; its interest being suspended by other more extraordinary and important dissensions between the church and empire. The pope, after tampering some time with the disaffected party in Germany, summoned Henry to appear at Rome, and vindicate himself from the charges alledged by his subjects. Such an outrage naturally exasperated a young and passionate monarch. Assembling a number of bishops and other vassals at Worms, he procured a sentence that Gregory should no longer be obeyed as lawful pope. But the time was past for those arbitrary encroachments, or at least high prerogatives of former emperors. The relations of dependency

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between church and state were now about to be reversed. Gregory had no sooner received accounts of the proceedings at Worms, than he summoned a council in the Lateran palace, and by a solemn sentence, not only excommunicated Henry, but deprived him of the kingdoms of Germany and Italy, releasing his subjects from their allegiance and forbidding them to obey him as sovereign. Thus Gregory VII. obtained the glory of leaving all his predecessors behind, and astonishing mankind by an act of audacity and ambition, which the most emulous of his successors could hardly surpass.*

The first impulses of Henry's mind on hearing

* The sentence of Gregory VII against the Emperor Henry was directed, we should always remember, to persons already well disposed to reject his authority. Men are glad to be told, that it is their duty to resist a sovereign against whom they are in rebellion, and will not be very scrupulous in examining conclusions which fall in with their inclinations and interests. Allegiance was in those turbulent ages easily thrown off, and the right of resistance was in continual exercise. To the Germans of the eleventh century, a prince unfit for Christian communion would easily appear unfit to reign over them, and though Henry had not given much real provocation to the pope, his vices and tyranny might seem to challenge any spiritual censure, or temporal chastisement. A nearly contemporary writer combines the two justifications of the rebellious party. Nemo Romanorum pontificem reges a regno deponere posse denegabit, quicunque decreta sanctissimi Papa Gregorii non proscribenda judicabit. Ipse enim vir apostolicus

Præterea, liberi homines Henricum eo pacto sibi præposuerunt in regem, ut electores suos juste judicare et regali providentiâ gubernare satageret, quod pactum ille postea prævaricari et contemnere non cessavit, &c. Ergo, et absque sedis apostolicæ judicio principes eum pro rege meritò refutare possent, cum pactum adimplere contemserit, quod in pro electione sua promiserat; quo non adimpleto, nec rex esse poterat. Vita Greg VII in Muratori, Script Rer Ital. t iii. p. 342.

Upon the other hand, the friends and supporters of Henry, though ecclesiastics, protested against this novel stretch of prerogative in the Roman see. Several proofs of this are adduced by Schmidt, t iii. p. 315.

this denunciation were indignation and resentment. But like other inexperienced and misguided sovereigns, he had formed an erroneous calculation of his own resources. A conspiracy long prepared, of which the dukes of Swabia and Carinthia were the chiefs, began to manifest itself; some were alienated by his vices, and others jealous of his family; the rebellious Saxons took courage; the bishops, intimidated by excommunications, withdrew from his side; and he suddenly found himself almost insulated in the midst of his dominions. In this desertion, he had recourse, through panic, to a miserable expedient. He crossed the Alps, with the avowed determination of submitting, and seeking absolution from the pope. Gregory was at Canossa, a fortress near Reggio, belonging to his faithful adherent, the countess Matilda. It was in a winter of unusual severity. The emperor was admitted, without his guards, into an outer court of the castle, and three successive days remained from morning till evening, in a woollen shirt and with naked feet, while Gregory, shut up with the countess, refused to admit him to his presence. On the fourth day he obtained absolution; but only upon condition of appearing on a certain day to learn the pope's decision, whether or no he should be restored to his kingdom, until which time he promised not to assume the ensigns of royalty. 1077

This base humiliation, instead of conciliating Henry's adversaries, forfeited the attachment of his friends. In his contest with the pope, he had

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found a zealous support in the principal Lombard cities, among whom the married and simoniacal clergy had great influence.* Indignant at his submission to Gregory, whom they affected to consider as an usurper of the papal chair, they now closed their gates against the emperor, and spoke openly of deposing him. In this singular position between opposite dangers, Henry retrod his late steps, and broke off his treaty with the pope; preferring, if he must fall, to fall as the defender rather than the betrayer of his imperial rights. The rebellious princes of Germany chose another king, Rodolph duke of Swabia, on whom Gregory, after some delay, bestowed the crown, with a Latin verse, importing that it was given by virtue of the orginal commission of St. Peter.† But the success of this pontiff, in his immediate designs, was not answerable to his intrepidity. Henry both subdued the German rebellion, and carried on the war with so much vigour or rather so little resistance, in Italy, that he was crowned in Rome by the antipope Guibert, whom he had

* There had been a kind of civil war at Milan for about twenty years before this time, excited by the intemperate zeal of some partizans who endeavoured to execute the papal decrees against irregular clerks by force. The history of these feuds has been written by two contemporaries, Arnulf and Landulf, published in the 4th volume of Muratori's Scriptores Rerum Italicarum; sufficient extracts from which will be found in St. Marc, t. iii p. 230 &c, and in Muratori's Annals. The Milanese clergy set up a pretence to retain wives, under the authority of their great archbishop, St. Ambrose, who, it seems, has spoken with more indulgence of this practice than most of the fathers. Both Arnulf and Landulf favour the married clerks; and were perhaps themselves of that description. Muratori.

† Petra dedit Petro, Petrus diadema Rodolpho.

raised in a council of his partizans to the government of the church instead of Gregory. The latter found an asylum under the protection of Roger Guiscard at Salerno, where he died an exile. His mantle, however, descended upon his successors, especially Urban II. and Paschal II., who strenuously persevered in the great contest for ecclesiastical independence; the former with a spirit and policy worthy of Gregory VII., the latter with steady, but disinterested prejudice.* They raised up enemies against Henry IV. out of the bosom of his family, instigating the ambition of two of his sons successively, Conrad and Henry, to mingle in the revolts of Germany. But Rome, under whose auspices the latter had not scrupled to engage in an almost parricidal rebellion, was soon disappointed by his unexpected tenaciousness of that obnoxious prerogative which had occasioned so much of his father's misery. He steadily refused to part with the right of investiture; and the empire was still committed in open hostility with the church for fifteen years of his reign. But Henry V. being stronger in the sup-

Dispute about investitures.

* Paschal II. was so conscientious in his abhorrence of investitures, that he actually signed an agreement with Henry V in 1110, whereby the prelates were to resign all the lands and other possessions which they held in fief of the emperor, on condition of the latter renouncing the right of investiture, which indeed, in such circumstances, would fall of itself. This extraordinary concession, as may be imagined, was not very satisfactory to the cardinals and bishops about Paschal's court, more worldly-minded than himself, nor to those of the emperor's party, whose joint clamours soon put a stop to the treaty. St. Marc, t. iv. p. 976. A letter of Paschal to Anselm (Schmidt, t. iii. p. 304.) seems to imply, that he thought it better for the church to be without riches, than to enjoy them on condition of doing homage to laymen.

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port of his German vassals than his father had been, none of the popes with whom he was engaged had the boldness to repeat the measures of Gregory VII. At length, each party grown weary of this ruinous contention, a treaty was agreed upon between the emperor and Calixtus II., which put an end by compromise to the question of ecclesiastical investitures. By this compact, the emperor resigned for ever all pretence to invest bishops by the ring and crosier, and recognized the liberty of elections. But, in return, it was agreed, that elections should be made in his presence, or that of his officers; and that the new bishop should receive his temporalities from the emperor by the sceptre.

Compromised by concordat of Calixtus.

1122

Both parties, in the concordat at Worms, receded from so much of their pretensions, that we might almost hesitate to determine which is to be considered as victorious. On the one hand, in restoring the freedom of episcopal elections, the emperors lost a prerogative of very long standing, and almost necessary to the maintenance of authority over not the least turbulent part of their subjects. And though the form of investiture by the ring and crosier seemed in itself of no importance, yet it had been in effect a collateral security against the election of obnoxious persons. For the emperors, detaining this necessary part of the pontificals until they should confer investiture,

* St. Marc, t. iv. p. 1093. Schmidt, t. iii. p. 178. The latter quotes the Latin words

prevented a hasty consecration of the new bishop, after which, the vacancy being legally filled, it would not be decent for them to withhold the temporalities. But then, on the other hand, they preserved by the concordat their feudal sovereignty over the estates of the church, in defiance of the language which had recently been held by its rulers. Gregory VII. had positively declared in the Lateran council of 1080, that a bishop or abbot receiving investiture from a layman should not be reckoned as a prelate.* The same doctrine had been maintained by all his successors, without any limitation of their censures to the formality of the ring and crosier. But Calixtus II. himself had gone much farther, and absolutely prohibited the compelling ecclesiastics to render any service to laymen on account of their benefices.† It is evident, that such a general immunity from feudal obligations for an order who possessed nearly half the lands in Europe struck at the root of those institutions by which the fabric of society was principally held together. This complete independency had been the aim of Gregory's disciples; and by yielding to the continuance of lay-investitures in any shape, Calixtus may, in this point of view, appear to have relinquished the

* St. Marc, t. iv. p. 774. A bishop of Piacenza asserts that prelates dishonoured their order by putting their hands, which held the body and blood of Christ, between those of impure laymen. p. 956. The same expressions are used by others, and are levelled at the form of feudal homage, which, according to the principles of that age, ought to have been as obnoxious as investiture.

† Id. p. 1061. 1067.

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principal object of contention. But as there have been battles, in which though immediate success may seem pretty equally balanced, yet we learn from subsequent effects to whom the intrinsic advantages of victory belonged, so it is manifest from the events that followed the settlement of this great controversy about investitures, that the see of Rome had conquered.

The emperors were not the only sovereigns whose practice of investiture excited the hostility of Rome, although they sustained the principal brunt of the war. A similar contest broke out under the pontificate of Paschal II. with Henry I. of England; for the circumstances of which, as they contain nothing peculiar, I refer to our own historians.* It is remarkable, that it ended in a compromise not unlike that adjusted at Worms; the king renouncing all sort of investitures, while the pope consented that the bishop should do homage for his temporalities. This was exactly the custom of France, where investiture by the ring and crosier is said not to have prevailed;* and it answered the main end of sovereigns by keeping up the feudal dependency of ecclesiastical estates. But the kings of Castile were more fortunate than the rest; discreetly yielding to the pride of Rome, they obtained what was essential to their own authority, and have always possessed, by the concession of Urban II., an absolute privi-

* Histoire du Droit public ecclesiastique Français, p. 261 I do not fully rely on this authority

legates of nomination to bishoprics in their dominions.* An early evidence of that indifference of the popes towards the real independence of national churches, to which subsequent ages were to lend abundant confirmation.

Introduction of capitular elections

When the emperors had surrendered their pretensions to interfere in episcopal elections, the primitive mode of collecting the suffrages of clergy and laity in conjunction, or at least of the clergy with the laity's assent and ratification, ought naturally to have revived. But in the twelfth century, neither the people, nor even the general body of the diocesan clergy, were considered as worthy to exercise this function. It soon devolved altogether upon the chapters of cathedral churches.† The original of these may be traced very high. In the earliest ages, we find a college of presbytery consisting of the priests and deacons, assistants as a council of advice or even a kind of parliament to their bishops. Parochial divisions, and fixed

* F Paul on Benefices, c 24 Zurita, Anales de Aragon, t iv p. 305 Fleury says that the kings of Spain nominate to bishoprics by virtue of a particular indulgence, renewed by the pope for the life of each prince. Institutions au Droit, t i. p. 106.

† Fra Paolo (Treatise of Benefices, c. 24.) says that between 1122 and 1145, it became a rule almost every where established, that bishops should be chosen by the chapter Schmidt, however, brings a few instances, where the consent of the nobility and other laics is expressed, though perhaps little else than a matter of form Innocent II seems to have been the first who declared, that whichever had the majority of the chapter in his favour should be deemed duly elected, and this was confirmed by Otho IV. in the capitulation upon his accession. Hist des Allemands, t iv p. 175 Fleury thinks that chapters had not an exclusive election till the end of the twelfth century. The second Lateran council in 1139 represses their attempts to engross it Institutions au Droit Eccles. t. i. p. 100.

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ministers attached to them, were not established till a later period. But the canons, or cathedral clergy, acquired afterwards a more distinct character. They were subjected by degrees to certain strict observances, little differing, in fact, from those imposed on monastic orders. They lived at a common table, they slept in a common dormitory, their dress and diet were regulated by peculiar laws. But they were distinguished from monks by the right of possessing individual property, which was afterwards extended to the enjoyment of separate prebends or benefices. These strict regulations, chiefly imposed by Louis the Debonair, went into disuse through the relaxation of discipline; nor were they ever effectually restored.* Meantime the chapters became extremely rich; and as they monopolized the privilege of electing bishops, it became an object of ambition with noble families to obtain canonries for their younger children, as the surest road to ecclesiastical honours and opulence. Contrary, therefore, to the general policy of the church, persons of inferior birth have been rigidly excluded from these foundations.

General conduct of Gregory VII.

The object of Gregory VII., in attempting to redress those more flagrant abuses which for two centuries had deformed the face of the Latin church, is not incapable, perhaps, of vindication, though no sufficient apology can be offered for the means he employed. But the disinterested

* Schmidt, t. ii. p. 224. 473; t. iii. p. 281. Encyclopédie, Art. Chanoine. F. Paul on Benefices, c. 16. Fleury, 8me Discours sur l'Hist. Eccles.

love of reformation, to which candour might ascribe the contention against investitures, is belied by the general tenor of his conduct, exhibiting an arrogance without parallel, and an ambition that grasped at universal and unlimited monarchy. He may be called the common enemy of all sovereigns, whose dignity as well as independence, mortified his infatuated pride. Thus we find him menacing Philip I. of France, who had connived at the pillage of some Italian merchants and pilgrims, not only with an interdict, but a sentence of deposition.* Thus too he asserts, as a known historical fact, that the kingdom of Spain had formerly belonged, by special right, to St. Peter; and by virtue of this imprescriptible claim, he grants to a certain Count de Rouci all territories which he should reconquer from the Moors, to be held in fief from the Holy See by a stipulated rent.† A similar pretension he makes to the kingdom of

* St Marc, t. iii. p. 628. Fleury, Hist. Eccles. t. xiii. p. 281. 284.

† The language he employs is worth quoting, as a specimen of his style. Non latere vos credimus, regnum Hispaniæ ab antiquo juris sancti Petri fuisse, et adhuc licet diu a paganis sit occupatum, lege tamen justitiæ non evacuata, nulli mortalium, sed soli apostolicæ sedi ex æquo pertinere. Quod enim auctore Deo semel in proprietates ecclesiarum justè pervenerit, manente Eo, ab usu quidem, sed ab earum jure, occasione transeuntis temporis, sine legitimâ concessione divelli non poterit. Itaque Comes Evalus de Rocelo, cujus famam apud vos haud obscuram esse putamus, terram illam ad honorem Sti Petri ingredi, et a paganorum manibus eripere cupiens, hanc concessionem ab apostolicâ sede obtinuit, ut partem illam, unde paganos suo studio et adjuncto sibi aliorum auxilio expellere possit, sub conditione inter nos factæ pactionis ex parte Su. Petri possideret. Labbe, Concilia, t. x. p. 10. Three instances occur in the Corps Diplomatique of Dumont, where a duke of Dalmatia, (t. i. p. 53.) a count of Provence, (p. 58.) and a count of Barcelona, (ibid.) put themselves under the feudal superiority and protection of Gregory VII. The motive was sufficiently obvious.

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Hungary, and bitterly reproaches its sovereign Solomon, who had done homage to the emperor, in derogation of St. Peter, his legitimate lord.* It was convenient to treat this apostle as a great feudal suzerain, and the legal principles of that age were dexterously applied to rivet more forcibly the fetters of superstition.†

While temporal sovereigns were opposing so inadequate a resistance to a system of usurpation contrary to all precedent, and to the common principles of society, it was not to be expected, that national churches should persevere in opposing pretensions, for which several ages had paved the way. Gregory VII. completed the destruction of their liberties. The principles contained in the decretals of Isidore, hostile as they were to ecclesiastical independence, were set aside as insufficient to establish the absolute monarchy of Rome. By a constitution of Alexander II., during whose pontificate Hildebrand himself was deemed the effectual pope, no bishop in the catholic church was permitted to exercise his functions, until he had received the confirmation of the Holy See:‡ a provision of vast importance, through which, beyond perhaps any other means, Rome has sustained, and still sustains, her temporal influence, as well as her ecclesiastical supremacy. The national churches, long abridged of their liberties by gradual encroachments, now

* St. Marc, t. iii. p. 624. 674. Schmidt, p. 73.

† The character and policy of Gregory VII are well discussed by Schmidt, t. iii p 307.

‡ St. Marc, p. 460.

found themselves subject to an undisguised and irresistible despotism. Instead of affording protection to bishops against their metropolitans, under an insiduous pretence of which the popes of the ninth century had subverted the authority of the latter, it became the favourite policy of their successors to harass all prelates with citations to Rome.* Gregory obliged the metropolitans to attend in person for the pallium.† Bishops were summoned even from England and the northern kingdoms to receive the commands of the spiritual monarch. William the Conqueror having made a difficulty about permitting his prelates to obey these citations, Gregory, though in general on good terms with that prince, and treating him with a deference which marks the effect of a firm character in repressing the ebullitions of overbearing pride,‡ complains of this as a persecution unheard of among pagans.§ The great quarrel between Archbishop Anselm and his two sovereigns, William Rufus and Henry I., was originally founded upon a similar refusal to permit his departure for Rome.

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This perpetual controul exercised by the popes over ecclesiastical, and in some degree over temporal affairs, was maintained by means of their legates, at once the ambassadors and the lieutenants of the Holy See. Previously to the latter part of

Authority of papal legates.

* Schmidt, t. iii. p. 80. 122.
† Id. t. iv. p. 170.
‡ St. Marc. p. 628. 781. Schmidt, t. iii. p. 82.
§ St. Marc, t. iv. p. 768. Collier, p. 252.

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the tenth age, these had been sent not frequently and upon special occasions. The legatine or vicarial commission had generally been entrusted to some eminent metropolitan of the nation within which it was to be exercised; as the archbishop of Canterbury was perpetual legate in England. But the special commissioners, or legates a latere, suspending the pope's ordinary vicars, took upon themselves an unbounded authority over the national churches, holding councils, promulgating canons, deposing bishops, and issuing interdicts at their discretion. They lived in splendour at the expense of the bishops of the province. This was the the more galling to the hierarchy, because simple deacons were often invested with this dignity, which set them above primates. As the sovereigns of France and England acquired more courage, they considerably abridged this prerogative of the Holy See, and resisted the entrance of any legates into their dominions without their consent [1].

From the time of Gregory VII., no pontiff thought of awaiting the confirmation of the emperor, as in earlier ages, before he was installed in the throne of St. Peter. On the contrary, it was pretended that the emperor was himself to be confirmed by the pope. This had indeed been broached by John VIII. two hundred years be-

[1] De Marca, l. vi. c. 28. 30. 31. Schmidt, t. ii. p. 408, t. iii. p. 112. Francois, p. 250. Fleury, 4me Discours sur l'Hist. Eccles. c. 10. 320. Hist. du Droit Public Eccl.

fore Gregory.* It was still a doctrine not calculated for general reception; but the popes availed themselves of every opportunity which the temporizing policy, the negligence, or bigotry of sovereigns threw into their hands. Lothaire coming to receive the imperial crown at Rome, this circumstance was commemorated by a picture in the Lateran palace, in which, and in two Latin verses subscribed, he was represented as doing homage to the pope.† When Frederic Barbarossa came upon the same occasion, he omitted to hold the stirrup of Adrian IV., who, in his turn, refused to Adrian IV. give him the usual kiss of peace; nor was the contest ended but by the emperor's acquiescence, who was content to follow the precedents of his predecessors. The same Adrian, expostulating with Frederic upon some slight grievance, reminded him of the imperial crown which he had conferred, and declared his willingness to bestow, if possible, still greater benefits. But the phrase employed (majora beneficia) suggested the idea of a fief, and the general insolence which pervaded

* Vide supra. It appears manifest, that the scheme of temporal sovereignty was only suspended by the disorders of the Roman See in the tenth century. Peter Damian, a celebrated writer of the age of Hildebrand, and his friend, puts these words into the mouth of Jesus Christ, as addressed to Pope Victor II. Ego claves totius universalis ecclesiæ meæ tuis manibus tradidi, et super eam te mihi vicarium posui, quam proprii sanguinis effusione redemi. Et si pauca sunt ista, etiam monarchias addidi immo sublato regis de medio totius Romani imperii vacantis tibi jura permisi. Schmidt, t. iii. p. 78.

† Rex venit ante fores, jurans prius urbis honores
Post homo fit papæ, sumit quo dante coronam
Muratori, Annali, A.D. 1157.

There was a pretext for this artful line. Lothaire had received the estate of Matilda in fief from the pope, with a reversion to Henry the Proud, his son in law. Schmidt, p. 349.

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Adrian's letter confirming this interpretation, a ferment arose among the German princes, in a congress of whom this letter was delivered. "From whom then," one of the legates was rash enough to say, "does the emperor hold his crown, except from the pope?" which so irritated a prince of Wittelsbach, that he was with difficulty prevented from cleaving the priest's head with his sabre.* Adrian IV. was the only Englishman that ever sat in the papal chair. It might, perhaps, pass for a favour bestowed on his natural sovereign, when he granted to Henry II. the kingdom of Ireland; yet the language of this donation, wherein he asserts all islands to be the exclusive property of St. Peter, should not have had a very pleasing sound to an insular monarch.

* Innocent III. 1194 - 1216

I shall not wait to comment on the support given to Becket by Alexander III., which must be familar to the English reader, nor on his speedy canonization; a reward which the church has always held out to its most active friends, and which may be compared to titles of nobility granted by a temporal sovereign.† But the epoch when the spirit of papal usurpation was most strikingly displayed was the pontificate of Innocent III. In each of the three leading objects which Rome has pursued, independent sove-

* Muratori, ubi supra. Schmidt, t. iii. p. 394.

† The first instance of a solemn papal canonization is that of St. Udalric by John XV., in 993. However, the metropolitans continued to meddle with this sort of apotheosis till the pontificate of Alexander III., who reserved it, as a choice prerogative, to the Holy See. Art de vérifier les Dates, t. i. p. 247. and 290.

reignty, supremacy over the Christian church, controul over the princes of the earth, it was the fortune of this pontiff to conquer. He realized, as we have seen in another place, that fond hope of so many of his predecessors, a dominion over Rome and the central parts of Italy. During his pontificate, Constantinople was taken by the Latins; and however he might seem to regret a diversion of the crusaders, which impeded the recovery of the Holy Land, he exulted in the obedience of the new patriarch, and the reunion of the Greek church. Never, perhaps, either before or since, was the great eastern schism in so fair a way of being healed; even the kings of Bulgaria and of Armenia acknowledged the supremacy of Innocent, and permitted his interference with their ecclesiastical institutions.

His extraordinary pretensions

The maxims of Gregory. VII. were now matured by more than a hundred years, and the right of trampling upon the necks of kings had been received, at least among churchmen, as an inherent attribute of the papacy. "As the sun and the moon are placed in the firmament," (such is the language of Innocent,) "the greater as the light of the day, and the lesser of the night, thus are there two powers in the church; the pontifical, which, as having the charge of souls, is the greater; and the royal, which is the less, and to which the bodies of men only are entrusted."* Intoxicated

* Vita Innocentii Tertii in Muratori, Scriptores Rerum Ital. tom. iii. pars i. p. 488. This life is written by a contemporary. St Marc, t. v. p. 12. Schmidt, t. iv. p. 227.

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with these conceptions, (if we may apply such a word to *successful* ambition,) he thought no quarrel of princes beyond the sphere of his jurisdiction. "Though I cannot judge of the right to a fief," said Innocent to the kings of France and England, "yet it is my province to judge where sin is committed, and my duty to prevent all public scandals." Philip Augustus, who had at that time the worse in his war with Richard, acquiesced in this sophism; the latter was more refractory, till the papal legate began to menace him with the rigour of the church.* But the king of England, as well as his adversary, condescended to obtain temporary ends by an impolitic submission to Rome. We have a letter from Innocent to the king of Navarre, directing him, on pain of spiritual censures, to restore some castles which he detained from Richard.† And the latter appears to have entertained hopes of recovering his ransom paid to the emperor and duke of Austria, through the pope's interference.‡ By such blind sacrifices of the greater to the less, of the future to the present, the sovereigns of

* Philippus rex Franciæ in manu ejus datâ fide promisit se ad mandatum ipsius pacem vel treugas cum rege Angliæ initurum. Richardus autem rex Angliæ se difficilem ostendebat. Sed cum idem legatus *ei cepit rigorem ecclesiasticum intentare*, amicis ductus consilio acquievit. Vita Innocentii Tertii, t. iii. pars i. p. 503.

† Innocentii Opera, (Coloniæ, 1574,) p. 124.

‡ Id. p. 134. Innocent actually wrote some letters for this purpose, but without any effect, nor was he probably at all solicitous about it. p. 139. and 141. Nor had he interfered to procure Richard's release from prison, though Eleanor wrote him a letter, in which she asks, "Has not God given you the power to govern nations and kings?" Velly, Hist. de France, t. iii. p. 382.

Europe played continually into the hands of their subtle enemy. CHAP VII.

Though I am not aware that any pope before Innocent III. had thus announced himself as the general arbiter of differences and conservator of the peace throughout Christendom, yet the scheme had been already formed, and the public mind was in some degree prepared to admit it. Gerohus, a writer who lived early in the twelfth century, published a theory of perpetual pacification, as feasible certainly as some that have been planned in later times. All disputes among princes were to be referred to the pope. If either party refused to obey the sentence of Rome, he was to be excommunicated and deposed. Every Christian sovereign was to attack the refractory delinquent, under pain of a similar forfeiture.* A project of this nature had not only a magnificence flattering to the ambition of the church, but was calculated to impose upon benevolent minds, sickened by the cupidity and oppression of princes. No control but that of religion appeared sufficient to restrain the abuses of society, while its salutary influence had already been displayed both in the Truce of God, which put the first check on the custom of private war, and more recently in the protection afforded to crusaders against all aggression during the continuance of their engagement. But reasonings from the excesses of liberty in favour of arbitrary government, or from the calamities of ECCLES. POWER.

* Schmidt, t. iv. p. 232.

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national wars in favour of universal monarchy, involve the tacit fallacy, that perfect, or at least superior, wisdom and virtue will be found in the restraining power. The experience of Europe was not such as to authorize so candid an expectation in behalf of the Roman See.

There were certainly some instances, where the temporal supremacy of Innocent III., however usurped, may appear to have been exerted beneficially. He directs one of his legates to compel the observance of peace between the kings of Castile and Portugal, if necessary, by excommunication and interdict.* He enjoins the king of Aragon to restore his coin which he had lately debased, and of which great complaint had arisen in his kingdom.† Nor do I question his sincerity in these, or in many other cases of interference with civil government. A great mind, such as Innocent III. undoubtedly possessed, though prone to sacrifice every other object to ambition, can never be indifferent to the beauty of social order, and the happiness of mankind. But, if we may judge by the correspondence of this remarkable person, his foremost gratification was the display of unbounded power. His letters, especially to ecclesiastics, are full of unprovoked rudeness. As impetuous as Gregory VII., he is unwilling to owe any thing to favour; he seems to anticipate denial, heats himself into anger as he proceeds, and where he commences with solicitation, seldom concludes without

* Innocent. Opera, p. 146 † p. 378

a menace.* An extensive learning in ecclesiastical law, a close observation of whatever was passing in the world, an unwearied diligence, sustained his fearless ambition.† With such a temper, and with such advantages, he was formidable beyond all his predecessors, and perhaps beyond all his successors. On every side, the thunder of Rome broke over the heads of princes. A certain Swero is excommunicated for usurping the crown of Norway. A legate, in passing through Hungary, is detained by the king: Innocent writes in tolerably mild terms to this potentate, but fails not to intimate that he might be compelled to prevent his son's succession to the throne. The king of Leon had married his cousin, a princess of Castile. Innocent subjects the kingdom to an interdict. When the clergy of Leon petition him to remove it, because when they ceased to perform their functions, the laity paid no tithes, and listened to heretical teachers when orthodox mouths were mute, the

* Innocent Opera, p. 31. 73. 76. &c. &c.

† The following instance may illustrate the character of this pope, and his spirit of governing the whole world, as much as those of a more public nature. He writes to the chapter of Pisa, that one Rubeus, a citizen of that place, had complained to him, that having mortgaged a house and garden for two hundred and fifty two pounds, on condition that he might redeem it before a fixed day, within which time he had been unavoidably prevented from raising the money, the creditor had now refused to accept it, and directs them to inquire into the facts, and if they prove truly stated, to compel the creditor by spiritual censures to restore the premises, reckoning their rent during the time of his mortgage as part of the debt, and to receive the remainder. Id. t. ii. p. 17. It must be admitted, that Innocent III. discouraged in general those vexatious and dilatory appeals from inferior ecclesiastical tribunals to the court of Rome, which had gained ground before his time, and especially in the pontificate of Alexander III.

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consented that divine service with closed doors, but not the rites of burial, might be performed.* The king at length gave way, and sent back his wife. But a more illustrious victory of the same kind was obtained over Philip Augustus, who, having repudiated Isemburga of Denmark, had contracted another marriage. The conduct of the king, though not without the usual excuse of those times, nearness of blood, was justly condemned; and Innocent did not hesitate to visit his sins upon the people by a general interdict. This, after a short demur from some bishops, was enforced throughout France; the dead lay unburied, and the living were cut off from the offices of religion, till Philip, thus subdued, took back his divorced wife. The submission of such a prince, not feebly superstitious, like his predecessor Robert, nor vexed with seditions, like the emperor Henry IV., but brave, firm, and victorious, is perhaps the proudest trophy in the scutcheon of Rome. Compared with this, the subsequent triumph of Innocent over our pusillanimous John seems cheaply gained, though the surrender of a powerful kingdom into the vassalage of the pope may strike us as a proof of stupendous baseness on one side, and audacity on the other.† Yet, under this very pon-

* Innocent Opera, t. ii p. 411. Vita Innocent III.

† The stipulated annual payment of 1000 marks was seldom made by the kings of England; but one is almost ashamed that it should ever have been so. Henry III. paid it occasionally, when he had any object to attain, and even Edward I. for some years the latest payment on record is in the seventeenth of his reign. After a long discontinuance, it was demanded in the fortieth of Edward III., (1366) but the parliament unanimously declared that John had no

tificate, it was not unparallelled. Peter I., king of Aragon, received at Rome the belt of knighthood and the royal crown from the hands of Innocent III.; he took an oath of perpetual fealty and obedience to him and his successors; he surrendered his kingdom, and accepted it again to be held by an annual tribute, in return for the protection of the Apostolic See.* This strange conversion of kingdoms into spiritual fiefs was intended as the price of security from ambitious neighbours, and may be deemed analogous to the change of alodial into feudal, or, more strictly, to that of lay into ecclesiastical tenure, which was frequent during the turbulence of the darker ages.

I have mentioned already, that among the new pretensions advanced by the Roman see, was that of confirming the election of an emperor. It had however been asserted rather incidentally, than in a peremptory manner. But the doubtful elections of Philip and Otho after the death of Henry VI. gave Innocent III. an opportunity of maintaining more positively this pretended right. In a decretal epistle addressed to the duke of Zahringen, the object of which is to direct him to transfer his allegiance from Philip to the other competitor, Innocent, after stating the mode in which a regular election ought to be made, declares the pope's

right to subject the kingdom to a superior without their consent; which put an end for ever to the applications. Prynne's Constitutions, vol. iii.

* Zurita, Anales de Aragon, t. i. f. 91. This was not forgotten towards the latter part of the same century, when Peter III. was engaged in the Sicilian war, and served as a pretence for the pope's sentence of deprivation.

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immediate authority to examine, confirm, anoint, crown and consecrate the elect emperor, provided he shall be worthy; or to reject him, if rendered unfit by great crimes, such as sacrilege, heresy, perjury, or persecution of the church; in default of election, to supply the vacancy; or, in the event of equal suffrages, to bestow the empire upon any person at his discretion.* The princes of Germany were not much influenced by this hardy assumption, which manifests the temper of Innocent III. and of his court, rather than their power. But Otho IV. at his coronation by the pope signed a capitulation, which cut off several privileges enjoyed by the emperors, even since the concordat of Calixtus, in respect of episcopal elections and investitures.†

Papal authority in the thirteenth century.

The noon-day of papal dominion extends from the pontificate of Innocent III. inclusively to that of Boniface VIII.; or, in other words, through the thirteenth century. Rome inspired during this age all the terror of her ancient name. She was once more the mistress of the world, and kings were her vassals. I have already anticipated the two most conspicuous instances when her temporal ambition displayed itself, both of which are inse-

* Decretal l. i. tit. 6. c. 34. commonly cited Venerabilem. The rubric or synopsis of this epistle asserts the pope's right electum imperatorem examinare, approbare, et inungere, consecrare et coronare, si est dignus; vel rejicere si est indignus, ut qui sacrilegus, excommunicatus, tyrannus, fatuus et hæreticus, paganus, perjurus, vel ecclesiæ persecutor. Et electoribus nolentibus eligere, Papa supplet. Et data paritate vocum eligentium, nec accedente majore concordiâ, Papa potest gratificari cui vult. The epistle itself is, if possible, more strongly expressed.

† Schmidt, t. iv. p. 149 175.

parable from the civil history of Italy.* In the first of these, her long contention with the house of Swabia, she finally triumphed. After his deposition by the council of Lyons, the affairs of Frederic II. went rapidly into decay. With every allowance for the enmity of the Lombards, and the jealousies of Germany, it must be confessed, that the proscription of Innocent IV. and Alexander IV. was the main cause of the ruin of his family. There is, however, no other instance, to the best of my judgement, where the pretended right of deposing kings has been successfully exercised. Martin IV. absolved the subjects of Peter of Aragon from their allegiance, and transferred his crown to a prince of France; but they did not cease to obey their lawful sovereign. This is the second instance which the thirteenth century presents of interference on the part of the popes in a great temporal quarrel. As feudal lords of Naples and Sicily, they had indeed some pretext for engaging in the hostilities between the houses of Anjou and Aragon, as well as for their contest with Frederic II. But the pontiffs of that age, improving upon the system of Innocent III., and sanguine with past success, aspired to render every European kingdom formally dependent upon the see of Rome. Thus Boniface VIII., at the instigation of some emissaries from Scotland, claimed that monarchy as paramount lord, and interposed,

* See above, chapter iii.

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though vainly, the sacred panoply of ecclesiastical rights to rescue it from the arms of Edward I.

This general supremacy affected by the Roman church over mankind in the twelfth and thirteenth centuries, derived material support from the promulgation of the canon law. The foundation of this jurisprudence is laid in the decrees of councils, and in the rescripts or decretal epistles of popes to questions propounded upon emergent doubts relative to matters of discipline and ecclesiastical œconomy. As the jurisdiction of the spiritual tribunals increased, and extended to a variety of persons and causes, it became almost necessary to establish an uniform system for the regulation of their decisions. After several minor compilations had appeared, Gratian, an Italian monk, published, about the year 1140, his Decretum, or general collection of canons, papal epistles, and sentences of fathers, arranged and digested into titles and chapters, in imitation of the Pandects, which very little before had begun to be studied again with great diligence. This work of Gratian, though it seems rather an extraordinary performance for the age when it appeared, has been censured for notorious incorrectness as well as inconsistency, and especially for the authority given in it to the false decretals of Isidore, and consequently to the papal supremacy. It fell, however, short of what was required in the progress of that usurpation. Gre-

* Dalrymple's Annals of Scotland, vol. i. p. 267.

gory IX. caused the five books of Decretals to be published by Raimond de Pennafort in 1234. These consist almost entirely of rescripts issued by the later popes, especially Alexander III., Innocent III., Honorius III., and Gregory himself. They form the most essential part of the canon law, the Decretum of Gratian being comparatively obsolete. In these books we find a regular and copious system of jurisprudence, derived in a great measure from the civil law, but with considerable deviation, and possibly improvement. Boniface VIII. added a sixth part, thence called the Sext, itself divided into five books, in the nature of a supplement to the other five, of which it follows the arrangement, and composed of decisions promulgated since the pontificate of Gregory IX. New constitutions were subjoined by Clement V. and John XXII., under the name of Clementines and Extravagantes Joannis; and a few more of later pontiffs are included in the body of canon law, arranged as a second supplement after the manner of the Sext, and called Extravagantes Communes.

The study of this code became of course obligatory upon ecclesiastical judges. It produced a new class of legal practitioners, or canonists; of whom a great number added, like their brethren the civilians, their illustrations and commentaries, for which the obscurity and discordance of many passages, more especially in the Decretum, gave ample scope. From the general analogy of the canon law to that of Justinian, the two systems

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became, in a remarkable manner, collateral and mutually intertwined, the tribunals governed by either of them borrowing their rules of decision from the other in cases where their peculiar jurisprudence is silent or of dubious interpretation.* But the canon law was almost entirely founded upon the legislative authority of the pope; the decretals are in fact but a new arrangement of the bold epistles of the most usurping pontiffs, and especially of Innocent III., with titles or rubrics, comprehending the substance of each in the compiler's language. The superiority of ecclesiastical to temporal power, or at least the absolute independence of the former, may be considered as a sort of key-note which regulates every passage in the canon law.† It is expressly declared, that subjects owe no allegiance to an excommunicated lord, if after admonition he is not reconciled to the church.‡ And the rubric prefixed to the declaration of Frederic II.'s deposition in the council of Lyons asserts that the pope may dethrone the emperor for lawful causes.§ These rubrics to the

* Duck, De Usu Juris Civilis, l. 1 c. 8.

† Constitutiones principum ecclesiasticis constitutionibus non præeminent, sed obsequuntur Decretum, distinct. 10. Statutum generale laicorum ad ecclesias vel ad ecclesiasticas personas, vel eorum bona in earum præjudicium non extenditur Decretal l. 1 tit. 2 c. 10 Quæcunque a principibus in ordinibus vel in ecclesiasticis rebus decreta inveniuntur, nullius auctoritatis esse monstrantur. Decretum, distinct. 96

‡ Domino excommunicato manente, subditi fidelitatem non debent, et si longo tempore in ea perstiterint, et monitus non pareat ecclesiæ, ab ejus debito absolvuntur. Decretal. l. v. tit. 37. c. 13. I must acknowledge, that the decretal epistle of Honorius III. scarcely warrants this general proposition of the rubric, though it seems to lead to it.

§ Papa imperatorem deponere potest ex causis legitimis. l. ii tit. 13 c. 2.

decretals are not perhaps of direct authority as part of the law; but they express its sense, so as to be fairly cited instead of it.* By means of her new jurisprudence, Rome acquired in every country a powerful body of advocates, who, though many of them were laymen, would, with the usual bigotry of lawyers, defend every pretension or abuse, to which their received standard of authority gave sanction.†

Mendicant orders.

Next to the canon law, I should reckon the institution of the mendicant orders among those circumstances which principally contributed to the aggrandizement of Rome. By the acquisition, and in some respects the enjoyment, or at least ostentation of immense riches, the ancient monastic orders had forfeited much of the public esteem.‡ Austere principles as to the obligation of evangelical poverty were inculcated by the numerous sectaries of that age and eagerly re-

* If I understand a bull of Gregory XIII., prefixed to his recension of the canon law, he confirms the rubrics or glosses along with the text; but I cannot speak with certainty as to his meaning.

† For the canon law, I have consulted, besides the Corpus Juris Canonici, Tiraboschi, Storia della Letteratura, t. iv. and v; Giannone, l. xiv. c. 3.: l. xix. c. 3; l. xxii. c. 8. Fleury, Institutions au Droit Ecclésiastique, t. i. p. 10. and 5me Discours sur l'Histoire Eccles. Duck, De Usu Juris Civilis, l. i. c. 8. Schmidt, t. iv. p. 39. F. Paul, Treatise of Benefices, c. 31. I fear that my few citations from the can[illegible] not made scientifically; [illegible] mode of reference [illegible] word, but the book and [illegible] are rather more convenient; and there are not many readers in England who will detect this impropriety.

‡ It would be easy to bring evidence from the writings of every successive century to the general viciousness of the regular clergy, whose memory it is sometimes the fashion to treat with respect. See particularly Muratori, Dissert. 65. and Fleury, 8me Discours. The latter observes that their great wealth was the cause of this relaxation in discipline.

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ceived by the people, already much alienated from an established hierarchy. No means appeared so efficacious to counteract this effect, as the institution of religious societies, strictly debarred from the insidious temptations of wealth. Upon this principle were founded the orders of Mendicant Friars, incapable, by the rules of their foundation, of possessing estates, and maintained only by alms and pious remunerations. Of these the two most celebrated were formed by St. Dominic and St. Francis of Assisa, and established by the authority of Honorius III. in 1216 and 1223. These great reformers, who have produced so extraordinary an effect upon mankind, were of very different characters; the one, active and ferocious, had taken a prominent part in the crusade against the unfortunate Albigeois, and was among the first who bore the terrible name of inquisitor; while the other, a harmless enthusiast, pious and sincere, but hardly of sane mind, was much rather accessory to the intellectual than to the moral degradation of his species. Various other mendicant orders were instituted in the thirteenth century; but most of them were soon suppressed, and besides the two principal, none remain but the Augustin and the Carmelites.[1]

These new preachers were received with astonishing approbation by the laity, whose religious zeal usually depends a good deal upon their opinion

[1] Mosheim's Ecclesiastical History. Fleury, 8me Discours. Crevier, Histoire de l'Université de Paris, t. i. p. 318.

of sincerity and disinterestedness in their pastors. And the progress of the Dominican and Franciscan friars in the thirteenth century bears a remarkable analogy to that of our English Methodists. Not deviating from the faith of the church, but professing rather to teach it in greater purity, and to observe her ordinances with greater regularity, while they imputed supineness and corruption to the secular clergy, they drew round their sermons a multitude of such listeners as in all ages are attracted by similar means. They practised all the stratagems of itinerancy, preaching in public streets, and administering the communion on a portable altar. Thirty years after their institution, an historian complains that the parish churches were deserted, that none confessed except to these friars, in short, that the regular discipline was subverted.* This uncontrouled privilege of performing sacerdotal functions, which their modern antitypes assume for themselves, was conceded to the mendicant orders by the favour of Rome. Aware of the powerful support [redacted] might receive in turn, the pontiffs of the [redacted] teenth century accumulated benefits upon the disciples of Francis and Dominic. They were exempted from episcopal authority; they were permitted to preach or hear confessions without leave of the ordinary,† to accept of legacies, and

* Matt. Paris, p. 607.

† Another reason for preferring the friars is given by Archbishop Peckham; quoniam casus episcopales reservati episcopis ab homine, vel a jure, communiter a Deum timentibus episcopis ipsis fratribus committuntur, et non presbyteris,

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to inter in their churches. Such privileges could not be granted without resistance from the other clergy; the bishops remonstrated, the university of Paris maintained a strenuous opposition; but their reluctance served only to protract the final decision. Boniface VIII. appears to have peremptorily established the privileges and immunities of the mendicant orders in 1295.*

It was naturally to be expected, that the objects of such extensive favours would repay their benefactors by a more than usual obsequiousness and alacrity in their service. Accordingly, the Dominicans and Franciscans vied with each other in magnifying the papal supremacy. Many of these monks became eminent in canon law and scholastic theology. The great lawgiver of the schools, Thomas Aquinas, whose opinions the Dominicans especially treat as almost infallible, went into the exaggerated principles of his age in favour of the see of Rome.† And as the professors of those sciences took nearly all the learning and logic of the times to their own share, it was hardly possible to repel their arguments by any direct

quorum simplicitas non sufficit alios dirigendis. Wilkins, Concilia, t. ii. p. 169.

* Crevier, Hist de l'Université de Paris, t. i. et t. ii. passim. Fleury, ubi supra. Hist du Droit Ecclésiastique François, t. i. p. 394. 396. 446 Collier's Ecclesiastical History, vol. i. p. 437. 448. 452. Wood's Antiquities of Oxford, vol. i. p. 376. 480 (Gutch's edition.)

† It was maintained by the enemies of the mendicants, especially William St Amour, that the pope could not give them a privilege to preach or perform the other duties of the parish priests. Thomas Aquinas answered, that a bishop might perform any spiritual functions within his diocese, or commit the charge to another instead, and that the pope, being to the whole church what a bishop is to his diocese, might do the same every where. Crevier, t. i. p. 474.

reasoning. But this partiality of the new monastic orders to the popes must chiefly be understood to apply to the thirteenth century, circumstances occurring in the next, which gave in some degree a different complexion to their dispositions in respect of the Holy See.

Papal dispensations of marriage.

We should not overlook, among the causes that contributed to the dominion of the popes, their prerogative of dispensing with ecclesiastical ordinances. The most remarkable exercise of this was as to the canonical impediments of matrimony. Such strictness as is prescribed by the Christian religion with respect to divorce was very unpalatable to the barbarous nations. They in fact paid it little regard; under the Merovingian dynasty, even private men put away their wives at pleasure.* In many capitularies of Charlemagne, we find evidence of the prevailing licence of repudiation and even polygamy.† The principles which the church inculcated were in appearance the very reverse of this laxity; yet they led indirectly to the same effect. Marriages were forbidden, not merely within the limits which nature, or those

* Marculfi Formulæ, l. ii. c 30

† Although a man might not marry again, when his wife had taken the veil, he was permitted to do so, if she was infected with the leprosy Compare Capitularia Pippini, A. D. 752 and 755. If a woman conspired to murder her husband he might re-marry. Id A. D. 753. A large proportion of Pepin's laws relate to incestuous connexions and divorces One of Charlemagne seems to imply, that polygamy was not unknown even among priests. Si sacerdotes plures uxores habuerint, sacerdotio priventur; quia secularibus deteriores sunt. Capitul. A. D. 769. This seems to imply that their marriage with one was allowable, which nevertheless is contradicted by other passages in the Capitularies.

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inveterate associations which we call nature, have rendered sacred, but as far as the seventh degree of collateral consanguinity, computed from a common ancestor.* Not only was affinity, or relationship by marriage, put upon the same footing as that by blood; but a fantastical connexion, called spiritual affinity, was invented in order to prohibit marriage between a sponsor and godchild. An union, however innocently contracted, between parties thus circumstanced might at any time be dissolved, and their subsequent cohabitation forbidden; though their children, I believe, in cases where there had been no knowledge of the impediment, were not illegitimate. One readily apprehends the facilities of abuse to which all this led; and history is full of dissolutions of marriage, obtained by fickle passion or cold-hearted ambition, to which the church has not scrupled to pander on some suggestion of relationship. It is so difficult to conceive, I do not say any reasoning, but any honest superstition, which could have produced those monstrous regulations, that I was at first inclined to suppose them designed to give, by a side wind, that facility of divorce which a

* See the canonical computation explained in St Marc, t. iii. p 376. Also in Blackstone's Law Tracts, Treatise on Consanguinity. In the eleventh century, an opinion began to gain ground in Italy, that third cousins might marry, being in the seventh degree according to the civil law. Peter Damian, a passionate abettor of Hildebrand and his maxims, treats this with horror, and calls it an heresy. Fleury, t. xiii. p. 152. St. Marc, ubi supra. This opinion was supported by a reference to the Institutes of Justinian; a proof, among several others, how much earlier that book was known than is vulgarly supposed.

licentious people demanded, but the church could not avowedly grant. This refinement would however be unsupported by facts. The prohibition is very ancient, and was really derived from the ascetic temper which introduced so many other absurdities.* It was not until the twelfth century that either this, or any other established rules of discipline were supposed liable to arbitrary dispensation; at least the stricter churchmen had always denied that the pope could infringe canons, nor had he asserted any right to do so.† But Innocent III. laid down as a maxim, that out of the plenitude of his power, he might lawfully dispense with the law; and accordingly granted, among other instances of this prerogative, dispensations from impediments of marriage to the emperor Otho IV.‡ Similar indulgences were given by his successors, though they did not become usual for some ages. The fourth Lateran Council in 1215 removed a great part of the restraint, by permitting marriages beyond the fourth degree, or what we call third cousins;§ and dispensations have been made more easy, when it

* Gregory I pronounces matrimony to be unlawful as far as the seventh degree; and even, if I understand his meaning, as long as any relationship could be traced; which seems to have been the maxim of strict theologians, though not absolutely enforced. Du Cange, v. Generatio. Fleury, Hist. Eccléa. t. xi. p. 211.

† De Marca, l. iii. cc. 7. 8. 14. Schmidt, t. iv. p. 235. Dispensations were originally granted only as to canonical penances, but not prospectively to authorize a breach of discipline. Gratian asserts that the pope is not bound by the canons; in which, Fleury observes, he goes beyond the False Decretals. Septième Discours, p. 291.

‡ Secundùm plenitudinem potestatis de jure possumus supra jus dispensare. Schmidt, t. iv. p. 235.

§ Fleury, Institutions au Droit Ecclésiastique, t. i. p. 296.

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was discovered that they might be converted into a source of profit. They served a more important purpose by rendering it necessary for the princes of Europe, who seldom could marry into one another's houses without transgressing the canonical limits, to keep on good terms with the court of Rome, which, in several instances that have been mentioned, fulminated its censures against sovereigns who lived without permission in what was considered an incestuous union.

Dispensations from promissory oaths.

The dispensing power of the popes was exerted in several cases of a temporal nature, particularly in the legitimation of children, for purposes even of succession. This Innocent III. claimed as an indirect consequence of his right to remove the canonical impediment which bastardy offered to ordination; since it would be monstrous, he says, that one who is legitimate for spiritual functions should continue otherwise in any civil matter.* But the most important and mischievous species of dispensations was from the observance of promissory oaths. Two principles are laid down in the decretals; that an oath disadvantageous to the church is not binding; and that one extorted by force was of slight obligation, and might be annulled by ecclesiastical authority.† As the first

* Decretal. l. iv. tit. 17. c. 13.

† Juramentum contra utilitatem ecclesiasticam prestitum non tenet. Decretal. l. ii. tit. 24. c. 27. et Sext. l. i. tit. 11. c. 1. A juramento per metum extorto ecclesia solet absolvere, et ejus transgressores ut peccantes mortaliter non punientur. Eodem lib. et tit. c. 15. The whole of this title in the decretals upon oaths seems to have given the first opening to the lax casuistry of succeeding times.

of these maxims gave the most unlimited privilege to the popes of breaking all faith of treaties which thwarted their interest or passion, a privilege which they continually exercised,* so the second was equally convenient to princes, weary of observing engagements towards their subjects or their neighbours. They reclaimed with a bad grace against the absolution of their people from allegiance by an authority to which they did not scruple to repair in order to bolster up their own perjuries. Thus Edward I. the strenuous asserter of his temporal rights, and one of the first who opposed a barrier to the encroachments of the clergy, sought at the hands of Clement V. a dis-

Take one instance out of many. —Piccinino, the famous condottiere of the fifteenth century, had promised not to attack Francis Sforza, at that time engaged against the pope Eugenius IV. (the same excellent person who had annulled the compactata with the Hussites, releasing those who had sworn to them, and who afterwards made the king of Hungary break his treaty with Amurath II.) absolves him from this promise, on the express ground that a treaty disadvantageous to the church ought not to be kept. Sismondi, t. ix. p. 196. The church, in that age, was synonymous with the papal territories in Italy.

It was in conformity to this sweeping principle of ecclesiastical utility, that Urban VI. made the following solemn and general declaration against keeping faith with heretics. Attendentes quod hujusmodi confœderationes, colligationes, et ligæ seu conventiones factæ cum hujusmodi hæreticis seu schismaticis postquam tales effecti erant, sunt temerariæ, illicitæ, et ipsojure nullæ, (etsi forte ante ipsorum lapsum in schisma, seu hæresin initæ, seu factæ fuissent,) etiam si forent juramento vel fide datâ firmatæ, aut confirmatione apostolicâ vel quâcunque firmitate aliâ roboratæ, postquam tales, ut præmittitur, sunt effecti. Rymer, t. vii. p. 352.

It was of little consequence that all divines and sound interpreters of canon law maintain that the pope cannot dispense with the divine or moral law, as De Marca tells us, l. iii. c. 15. though he admits that others of less sound judgement assert the contrary; as was common enough, I believe, among the Jesuits at the beginning of the seventeenth century. His power of interpreting the law was of itself a privilege of dispensing with it.

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pensation from his oath to observe the great statute against arbitrary taxation.

In all the earlier stages of papal dominion, the supreme head of the church had been her guardian and protector; and this beneficent character appeared to receive its consummation in the result of that arduous struggle which restored the ancient practice of free election to ecclesiastical dignities. Not long however after this triumph had been obtained, the popes began by little and little to interfere with the regular constitution. Their first step was conformable indeed to the prevailing system of spiritual independency. By the concordat of Calixtus, it appears that the decision of contested elections was reserved to the emperor, assisted by the metropolitan and suffragans. In a few cases during the twelfth century, this imperial prerogative was exercised, though not altogether undisputed.* But it was consonant to the prejudices of that age to deem the supreme pontiff a more natural judge, as in other cases of appeal. The point was early settled in England, where a doubtful election to the archbishopric of York, under Stephen, was referred to Rome, and there kept five years in litigation.† Otho IV. surrendered this among other rights of the empire to

Encroachments of popes on the freedom of elections.

* Schmidt, t. iii. p. 299.; t. iv. p. 149. According to the concordat, elections ought to be made in the presence of the emperor, or his officers; but the chapters contrived to exclude them by degrees, though not perhaps till the thirteenth century. Compare Schmidt, t. iii. p. 296.; t. iv. p. 146.

† Henry's Hist. of England, vol. v. p. 324. Lyttleton's Henry II. vol. i. p. 356.

Innocent III. by his capitulation;* and from that pontificate the papal jurisdiction over such controversies became thoroughly recognized. But the real aim of Innocent, and perhaps of some of his predecessors, was to dispose of bishoprics, under pretext of determining contests, as a matter of patronage. So many rules were established, so many formalities required by their constitutions, incorporated afterwards into the canon law, that the court of Rome might easily find means of annulling what had been done by the chapter, and bestowing the see on a favourite candidate.† The popes soon assumed not only a right of decision, but of devolution; that is, of supplying the want of election, or the unfitness of the elected, by a nomination of their own.‡ Thus Archbishop Langton, if not absolutely nominated, was at least chosen in an invalid and compulsory manner, by the order of Innocent III.; as we may read in our English historians. And several succeeding archbishops of Canterbury equally owed their promotion to the papal prerogative. Some instances of

And on rights of patronage.

* Schmidt, t. iv. p. 149. One of these was the *spolium*, or moveable estate of a bishop, which the emperor was used to seize upon his decease. p. 154. It was certainly a very *leonine* prerogative; but the popes did not fail at a subsequent time to claim it for themselves. Fleury, Institutions au Droit, t. i. p. 425. Lenfant, Concile de Constance, t. ii. p. 130.

† F Paul, c. 30. Schmidt, t. iv. p. 177. 247.

‡ Thus we find it expressed, as captiously as words could be devised, in the decretals, l. i. tit. 6. c. 22 Electus a majori et saniori parte capituli, si est, et erat idoneus tempore electionis, confirmabitur: si autem erit indignus in ordinibus scientiâ vel statu, et fuit scienter electus, electus a minori parte, si est dignus, confirmabitur.

A person canonically disqualified when presented to the pope for confirmation was said to be *postulatus*, not *electus*

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the same kind occurred in Germany, and it became the constant practice in Naples.*

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Mandats.

While the popes were thus artfully depriving the chapters of their right of election to bishopics, they interfered in a more arbitrary manner with the collation of inferior benefices. This began, though in so insensible a manner as to deserve no notice but for its consequences, with Adrian IV., who requested some bishops to confer the next benefice that should become vacant on a particular clerk.† Alexander III. used to solicit similar favours.‡ These recommendatory letters were called mandats. But though such requests grew more frequent than was acceptable to patrons, they were preferred in moderate language, and could not decently be refused to the apostolic chair. Even Innocent III. seems in general to be aware that he is not asserting a right; though in one instance, I have observed his violent temper break out against the chapter of Poitiers, who had made some demur to the appointment of his clerk, and whom he threatens with excommunication and interdict.§ But, as we find in the history of all usurping governments, time changes anomaly into system, and injury into right; examples beget custom, and custom ripens into law; and the doubtful precedent of one generation becomes the fundamental maxim of another. Honorius III.

* Giannone, l. xiv. c. 6.; l. xix. c. 5.

† St. Marc, t. v. p. 41. Art de vérifier les Dates, t. i. p. 288. Encyclopédie, Art. Mandats.

‡ Schmidt, t. iv. p. 239.

§ Innocent. III. Opera, p. 502.

requested that two prebends in every church might be preserved for the holy see; but neither the bishops of France nor England, to whom he preferred this petition, were induced to comply with it.* Gregory IX. pretended to act generously in limiting himself to a single expectative, or letter directing a particular clerk to be provided with a benefice, in every church.† But his practice went much farther. No country was so intolerably treated by this pope and his successors as England, throughout the ignominious reign of Henry III. Her church seemed to have been so richly endowed only as the free pasture of Italian priests, who were placed, by the mandatory letters of Gregory IX. and Innocent IV. in all the best benefices. If we may trust a solemn remonstrance in the name of the whole nation, they drew from England, in the middle of the thirteenth century, sixty or seventy thousand marks every year; a sum far exceeding the royal revenue.‡ This was asserted by the English envoys at the council of Lyons. But the remedy was not to be sought in remonstrances to the court of Rome, which exulted in the success of its encroachments. There was no defect of spirit in the nation to oppose a more adequate resistance; but the individual upon the throne sacrificed the public interest sometimes through habitual timidity, sometimes through silly ambition. If England however

* Matt. Paris, p. 267. De Marca, l. iv. c. 9.

† F. Paul on Benefices, c. 20.

‡ M. Paris, p. 579. 740.

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suffered more remarkably, yet other countries were far from being untouched. A German writer about the beginning of the fourteenth century mentions a cathedral, where out of about thirty-five vacancies of prebends that had occurred within twenty years, the regular patron had filled only two.* The case was not very different in France, where the continual usurpations of the popes are said to have produced the celebrated Pragmatic Sanction of St. Louis. This edict, which is not of undisputed authority, contains three important provisions; namely, that all prelates and other patrons shall enjoy their full rights as to the collation of benefices, according to the canons; that churches shall possess freely their rights of election; and that no tax or pecuniary exaction shall be levied by the pope, without consent of the king, and of the national church.† We do not find, however, that the French government acted up to the spirit of this ordinance, if it be genuine; and the holy see continued to invade the rights of collation with less ceremony than they had hitherto used. Clement IV. published a

* Schmidt, t. vi. p. 104.

† Ordonnances des Rois de France, t. i. p. 97. There are several material objections to the authenticity of this edict, and in particular that we do not find the king to have had any previous differences with the see of Rome; on the contrary, he was just indebted to Clement IV. for bestowing the crown of Naples on his brother the count of Provence. Velly has defended it, Hist. de France, t. vi. p. 57 and in the opinion of the learned Benedictine editors of L'Art de vérifier les Dates, t. i. p. 585. cleared up all difficulties as to its genuineness. In fact, however, the Pragmatic Sanction of St. Louis stands by itself, and can only be considered as a protestation against abuses which it was still impossible to suppress.

bull in 1266, which, after asserting an absolute prerogative of the supreme pontiff to dispose of all preferments, whether vacant or in reversion, confines itself in the enacting words to the reservation of such benefices as belong to persons dying at Rome (vacantes in curiâ.)* These had for some time been reckoned as a part of the pope's special patronage; and their number, when all causes of importance were drawn to his tribunal, when metropolitans were compelled to seek their pallium in person, and even by a recent constitution, exempt abbots to repair to Rome for confirmation,† not to mention the multitude who flocked thither as mere courtiers and hunters after promotion, must have been very considerable. Boniface VIII. repeated this law of Clement IV. in a still more positive tone;‡ and Clement V. laid down as a maxim, that the pope might freely bestow, as universal patron, all ecclesiastical benefices.§ In order to render these tenable by their Italian courtiers, the canons against pluralities and non-residence were dispensed with; so that individuals were said to have accumulated fifty or sixty preferments.‖ It was a consequence from this extravagant principle, that the pope might prevent the ordinary collator upon a vacancy; and as this

Provisions, reserves, &c.

* Sext. Decretal l. iii. t. iv. c. 4. F. Paul on Benefices, c. 35. This writer thinks the privilege of nominating benefices vacant in curiâ to have been among the first claimed by the popes, even before the usage of mandats. c. 30.

† Matt. Paris, p. 817.

‡ Sext. Decretal. l. iii. t. iv. c. 3. He extended the vacancy in curiâ to all places within two days journey of the papal court.

§ F. Paul, c. 35.

‖ Id. c. 33, 34, 35. Schmidt, t. iv. p. 104.

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could seldom be done with sufficient expedition in places remote from his court, that he might make reversionary grants during the life of an incumbent, or reserve certain benefices specifically for his own nomination.

Papal taxation of the clergy.

The persons as well as estates of ecclesiastics were secure from arbitrary taxation, in all the kingdoms founded upon the ruins of the empire, both by the common liberties of freemen, and more particularly by their own immunities and the horror of sacrilege.* Such at least was their legal security, whatever violence might occasionally be practised by tyrannical princes. But this exemption was compensated by annual donatives, probably to a large amount, which the bishops and monasteries were accustomed, and as it were compelled, to make to their sovereigns.† They were subject also, generally speaking, to the feudal services and prestations. Henry I. is said to have extorted a sum of money from the English church.‡ But the first eminent instance of a general tax required from the clergy was the famous Saladine tithe; a tenth of all moveable estate, imposed by the kings of France and England upon all their subjects, with the consent of their great councils of prelates and barons, to defray the expense of their intended crusade. Yet even this contribution, though called for by the imminent peril of the Holy Land after the

* Muratori, Dissert. 70 Schmidt, t iii p. 211.

† Id. Ibid. Du Cange, v Dona.

‡ Eadmer, p. 83.

capture of Jerusalem, was not paid without reluctance, the clergy doubtless anticipating the future extension of such a precedent. Many years had not elapsed, when a new demand was made upon them, but from a different quarter. Innocent III. (the name continually recurs when we trace the commencement of an usurpation) imposed in 1199 upon the whole church a tribute of one-fortieth of moveable estate, to be paid to his own collectors; but strictly pledging himself that the money should only be applied to the purposes of a crusade.† This crusade ended, as is well known, in the capture of Constantinople. But the word had lost much of its original meaning; or rather that meaning had been extended by ambition and bigotry. Gregory IX. preached a crusade against the emperor Frederic, in a quarrel which only concerned his temporal principality; and the church of England was taxed by his authority to carry on this holy war.‡ After some op-

Schmidt, t. iv. p. 212. Lyttleton's Henry II. vol. iii. p. 472. Velly, t. iii. p. 316.

† Innocent Opera, p. 266.

‡ M. Paris, p. 420. It was hardly possible for the clergy to make any effective resistance to the pope, without unravelling a tissue which they had been assiduously weaving. One English prelate distinguished himself in this reign by his strenuous protestation against all abuses of the church. This was Robert Grosstete, bishop of Lincoln, who died in 1253, the most learned Englishman of his time, and the first who had any tincture of Greek literature. Matthew Paris gives him a high character, which he deserved for his learning and integrity, one of his commendations is for keeping a good table. But Grosstete appears to have been imbued in a great degree with the spirit of his age, as to ecclesiastical power, though unwilling to yield it up to the pope: and it is a strange thing to reckon him among the precursors of the Reformation. M. Paris, p. 754. Berington's Literary History of the Middle Ages, p. 378.

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position the bishops submitted; and from that time no bounds were set to the rapacity of papal exactions. The usurers of Cahors and Lombardy, residing in London, took up the trade of agency for the pope; and in a few years, he is said, partly by levies of money, partly by the revenues of benefices, to have plundered the kingdom of 950,000 marks; a sum equivalent, I think, to not less than fifteen millions sterling at present. Innocent IV., during whose pontificate the tyranny of Rome, if we consider her temporal and spiritual usurpations together, reached perhaps its zenith, hit upon the device of ordering the English prelates to furnish a certain number of men at arms to defend the church at their expense. This would soon have been commuted into a standing escuage instead of military service.* But the demand was perhaps not complied with, and we do not find it repeated. Henry III.'s pusillanimity would not permit any effectual measures to be adopted; and indeed he sometimes shared in the booty, and was indulged with the produce of taxes imposed upon his own clergy to defray the cost of his projected war against Sicily.† A nobler example was set by the kingdom of Scotland: Clement IV. having,

* M. Paris, p. 613. It would be endless to multiply proofs from Matthew Paris, which indeed occur in almost every page. His laudable zeal against papal tyranny, on which some protestant writers have been so pleased to dwell, was a little stimulated by personal feelings for the abbey of St. Alban's; and the same remark is probably applicable to his love of civil liberty.

† Rymer, t. i. p. 599. &c. The substance of English ecclesiastical history during the reign of Henry III. may be collected from Henry, and still better from Collier.

in 1267, granted the tithes of its ecclesiastical revenues for one of his mock crusades, King Alexander III., with the concurrence of the church, stood up against this encroachment, and refused the legate permission to enter his dominions.* Taxation of the clergy was not so outrageous in other countries; but the popes granted a tithe of benefices to St. Louis for each of his own crusades, and also for the expedition of Charles of Anjou against Manfred.† In the council of Lyons, held by Gregory X. in 1274, a general tax of the same proportion was imposed on all the Latin church, for the pretended purpose of carrying on a holy war.‡

Disaffection towards the court of Rome.

These gross invasions of ecclesiastical property, however submissively endured, produced a very general disaffection towards the court of Rome. The reproach of venality and avarice was not indeed cast for the first time upon the sovereign pontiffs; but it had been confined, in earlier ages, to particular instances, not affecting the bulk of the catholic church. But, pillaged upon every slight pretence, without law and without redress, the clergy came to regard their once paternal monarch as an arbitrary oppressor. All writers of the thirteenth and following centuries complain in terms of unmeasured indignation, and seem almost ready to reform the general abuses of the church.

* Dalrymple's Annals of Scotland, vol. i. p. 179.*

† Velly, t. iv. p. 343.; t. v. p. 343.; t. vi. p. 47.

‡ Idem, t. vi. p. 308 St. Marc, t. vi. p 347.

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They distinguished however clearly enough between the abuses which oppressed them and those which it was their interest to preserve, nor had the least intention of waving their own immunities and authority. But the laity came to more universal conclusions. A spirit of inveterate hatred grew up among them, not only towards the papal tyranny, but the whole system of ecclesiastical independence. The rich envied and longed to plunder the estates of the superior clergy; the poor learned from the Waldenses and other sectaries to deem such opulence incompatible with the character of evangelical ministers. The itinerant minstrels invented tales to satirize vicious priests, which a predisposed multitude eagerly swallowed. If the thirteenth century was an age of more extravagant ecclesiastical pretensions than any which had preceded, it was certainly one in which the disposition to resist them acquired greater consistence.

Progress of ecclesiastical jurisdiction

To resist had indeed become strictly necessary, if the temporal governments of Christendom would occupy any better station than that of officers to the hierarchy. I have traced already the first stage of that ecclesiastical jurisdiction, which, through the partial indulgence of sovereigns, especially Justinian and Charlemagne, had become nearly independent of the civil magistrate. Several ages of confusion and anarchy ensued, during which the supreme regal authority was literally suspended in France, and not much respected in some other countries. It is natural to

suppose, that ecclesiastical jurisdiction, so far as even that was regarded in such barbarous times, would be esteemed the only substitute for coercive law, and the best security against wrong. But I am not aware that it extended itself beyond its former limits, till about the beginning of the twelfth century. From that time it rapidly encroached upon the secular tribunals, and seemed to threaten the usurpation of an exclusive supremacy over all persons and causes. The bishops gave the tonsure indiscriminately, in order to swell the list of their subjects. This sign of a clerical state, though below the lowest of their seven degrees of ordination, implying no spiritual office, conferred the privileges and immunities of the profession on all who wore an ecclesiastical habit, and had only once been married.* Orphans and widows, the stranger and the poor, the pilgrim and the leper, under the appellation of persons in distress (miserabiles personæ), came within the peculiar cognizance and protection of the church; nor could they be sued before any lay tribunal. And the whole body of crusaders, or such as merely took the vow of engaging in a crusade, enjoyed the same clerical privileges.

* Clerici qui cum unicis et virginibus contraxerunt, si tonsuram et vestes deferant clericales, privilegium retineant —— presenti declaramus edicto, hujusmodi clericos conjugatos pro commissis ab iis excessibus vel delictis, trahi non posse criminaliter aut civiliter ad judicium secolare. Bonifacius Octavus, in Sext. Decretal. l. iii. tit. ii. c. 1. Philip the Bold, however, had subjected these married clerks to taxes, and later ordinances of the French kings rendered them amenable to temporal jurisdiction, from which, in Naples, by various provisions of the Angevin line, they always continued free. Giannone, l. xix. c. 5.

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But where the character of the litigant parties could not, even with this large construction, be brought within their pale, the bishops found a pretext for their jurisdiction in the nature of the dispute. Spiritual causes alone, it was agreed, could appertain to the spiritual tribunal. But the word was indefinite: and according to the interpreters of the twelfth century, the church was always bound to prevent and chastise the commission of sin. By this sweeping maxim, which we have seen Innocent III. apply to vindicate his controul over national quarrels, the common differences of individuals, which generally involve some charge of wilful injury, fell into the hands of a religious judge. One is almost surprized to find that it did not extend more universally, and might praise the moderation of the church. Real actions or suits relating to the property of land, were always the exclusive province of the lay court, even where a clerk was the defendant.* But the ecclesiastical tribunals took cognizance of breaches of contract, at least where an oath had been pledged, and of personal trusts.† They had not only an exclusive jurisdiction over questions immediately matrimonial, but a concurrent one with the civil magistrate in France, though never

* Decretal. l. II. t. II. Ordonnances des Rois, t. I. p. 40. (A. D. 1189.) In the council of Lambeth in 1261, the bishops claim a right to judge inter clericos suos, vel inter laicos conquerentes et clericos defendentes, in personalibus actionibus super contractibus, aut delictis, aut quasi. i. e. quasi debitis. Wilkins, Concilia, t. I. p. 747.

† Ordonnances des Rois, p. 319. (A. D. 1260.)

in England, over matters incident to the nuptial contract, as claims of marriage portion, and of dower.* They took the execution of testaments into their hands, on account of the legacies to pious uses, which testators were advised to bequeath.† In process of time, and under favourable circumstances, they made still greater strides. They pretended a right to supply the defects, the doubts, or the negligence of temporal judges; and invented a class of mixed causes, whereof the lay or ecclesiastical jurisdiction took possession according to priority. Besides this extensive authority in civil disputes, they judged of some offences, which naturally belong to the criminal law, as well as of some others, which participate of a civil and criminal nature. Such were perjury, sacrilege, usury, incest, and adultery;‡ from the punishment of all which the secular magistrate refrained, at least in England, after they had become the province of a separate jurisdiction. Excommunication still continued the only chastisement which the church could directly inflict. But the bishops acquired a right of having their own pri-

* Ordonnances des Rois, p 40. 121. 220 319.

† Id. p. 319. Glanvil, l vii c 7. Sancho IV. gave the same jurisdiction to the clergy of Castile, Tejada de las Cortes, t. iii. p. 20; and in other respects followed the example of his father Alfonso X. in favouring their encroachments. The church of Scotland seems to have had nearly the same jurisdiction as that of England. Pinkerton's Hist. of Scotland, vol. i. p 173.

‡ It was a maxim of the canon, as well as the common law, that no person should be punished twice for the same offence; therefore, if a clerk had been degraded, or a penance imposed on a layman, it was supposed unjust to proceed against him in a temporal court.

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sons for lay offenders,* and the monasteries were the appropriate prisons of clerks. Their sentences of excommunication were enforced by the temporal magistrate by imprisonment or sequestration of effects; in some cases by confiscation or death.†

and immunity.

The clergy did not forget to secure along with this jurisdiction their own absolute exemption from the criminal justice of the state. This, as I have above mentioned, had been conceded to them by Charlemagne; but how far the same privilege existed in countries not subject to his empire, such as England, or even in France and Germany during the three centuries after his reign, is what I am not able to assert. The False Decretals contain some passages in favour of ecclesiastical immunity, which Gratian repeats in his collection‡ About the middle of the twelfth century the principle obtained general reception, and Innocent III. decided it to be an inalienable right of the clergy, whereof they could not be divested even

* Charlemagne is said by Giannone to have permitted the bishops to have prisons of their own, l. vi. c. 7.

† Giannone, l. xix. c. 5. t. iii. Schmidt, t. iv. p. 195.; t. vi. p. 125. Fleury, 7me Discours, Mém. de l'Acad. des Inscript. t. xxxix. p. 603. Ecclesiastical jurisdiction not having been uniform in different ages and countries, it is difficult, without much attention, to distinguish its general and permanent attributes from those less completely established. Its description as given in the Decretals, lib. ii. tit. ii. De foro competenti, does not support the pretensions made by the canonists, nor come up to the sweeping definition of ecclesiastical jurisdiction by Boniface VIII. in the Sext. l. ii. tit. xxiii. c. 40. sive ambæ partes hoc voluerint, sive una super causis ecclesiasticis, sive quæ ad forum ecclesiasticum ratione personarum, negotiorum, vel rerum de jure vel de antiquâ consuetudine pertinere noscuntur.

‡ Fleury, 7me Discours.

by their own consent.* Much less were any constitutions of princes, or national usages deemed of force to abrogate such an important privilege.† These, by the canon law, were invalid when they affected the rights and liberties of holy church.‡ But the spiritual courts were charged with scandalously neglecting to visit the most atrocious offences of clerks with such punishment as they could inflict. The church could always absolve from her own censures; and confinement in a monastery, the usual sentence upon criminals, was frequently slight and temporary. Several instances are mentioned of heinous outrages that remained nearly unpunished through the shield of ecclesiastical privilege.§ And as the temporal courts refused their assistance to a rival jurisdiction, the clergy had no redress for their own injuries, and even the murder of a priest at one time, as we are told, was only punishable by excommunication.‖

Endeavours made to repress it in England

Such an incoherent medley of laws and magistrates, upon the symmetrical arrangement of which all social œconomy mainly depends, could not fail to produce a violent collision. Every sovereign was interested in vindicating the autho-

* Fleury, 7me Disc. Institutions au Droit Eccles. t. 2. p. 8

† In criminalibus causis in nullo casu possunt clerici ab aliquo quam ab ecclesiastico judice condemnari, etiamsi consuetudo regia habeat ut fures a judicibus secularibus judicentur. Decretal. l. i. tit. i. c. 8.

‡ Decret. distinct. 96.

§ Collier, vol i. p. 351. It is laid down in the canon laws that a layman cannot be a witness in a criminal case against a clerk. Decretal. l. ii tit. xx. c. 14.

‖ Lyttleton's Henry II., vol iii. p 332. This must be restricted to that period of open hostility between the church and state.

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rity of the constitutions which had been formed by his ancestors, or by the people whom he governed. But the first who undertook this arduous work, the first who appeared openly against ecclesiastical tyranny, was our Henry II. The Anglo-saxon church, not so much connected as some others with Rome, and enjoying a sort of barbarian immunity from the thraldom of canonical discipline, though rich, and highly respected by a devout nation, had never, perhaps, desired the thorough independence upon secular jurisdiction at which the continental hierarchy aimed. William the Conqueror first separated the ecclesiastical from the civil tribunal, and forbad the bishops to judge of spiritual causes in the hundred court.* His language is, however, too indefinite to warrant any decisive proposition as to the nature of such causes, probably they had not yet been carried much beyond their legitimate extent. Of clerical exemption from the secular arm we find no earlier notice than in the coronation oath of Stephen; which, though vaguely expressed, may be con-

* Ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in Hundret placita teneant, nec causam quæ ad regimen animarum pertinet, ad judicium secularium hominum adducant. Wilkins, Leges Anglo-Saxon. 230.

Before the conquest, the bishop and earl sat together in the court of the county or hundred; and as we may infer from the tenor of this charter, ecclesiastical matters were decided loosely, and rather by the common law than according to the canons. This practice had been already forbidden by some canons enacted under Edgar, id. p. 83.; but apparently with little effect. The separation of the civil and ecclesiastical tribunals was not made in Denmark till the reign of Nicolas, who ascended the throne in 1105. Langebek, Script. Rer. Danic. t. iv. p. 380. Others refer the law to St. Canut, about 1080. t. ii. p. 209.

strued to include it.* But I am not certain, that the law of England had unequivocally recognized that claim at the time of the constitutions of Clarendon. It was at least an innovation, which the legislature might without scruple or transgression of justice abolish. Henry II., in that famous statute, attempted in three respects to limit the jurisdiction assumed by the church; asserting for his own judges the cognizance of contracts, however confirmed by oath, and of rights of advowson, and also that of offences committed by clerks, whom, as it is gently expressed, after conviction or confession the church ought not to protect.† These constitutions were the leading subject of difference between the king and Thomas Becket. Most of them were annulled by the pope, as derogatory to ecclesiastical liberty. It is not improbable, however, that if Louis VII. had played a more dignified part, the see of Rome, which an existing schism rendered dependent upon the favour of those two monarchs, might have receded in some measure from her pretensions. But France implicitly giving way to the encroachments of ecclesiastical power, it became impossible for Henry completely to withstand them.

The constitutions of Clarendon, however, produced some effect, and, in the reign of Henry III.

* Ecclesiasticarum personarum et omnium clericorum, et rerum eorum justitiam et potestatem, et distributionem bonorum ecclesiasticorum, in manu episcoporum esse perhibeo, et confirmo. Wilkins, Leges Anglo-Saxon. p. 310

† Wilkins, Leges Anglo-Saxon p. 323 Lyttleton's Henry II. Collier, &c.

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more unremitted and successful efforts began to be made to maintain the independence of temporal government. The judges of the king's court had until that time been themselves principally ecclesiastics, and consequently tender of spiritual privileges.* But now abstaining from the exercise of temporal jurisdiction, in obedience to the strict injunctions of their canons,† the clergy gave place to common lawyers, professors of a system very discordant from their own. These soon began to assert the supremacy of their jurisdiction by issuing writs of prohibition, whenever the ecclesiastical tribunals passed the boundaries which approved use had established.‡ Little accustomed to such controul, the proud hierarchy chafed under the bit; several provincial synods reclaim against the pretensions of laymen to judge the anointed ministers, whom they were bound to obey;§ the cognizance of rights of patronage and breaches of contract is boldly asserted;‖ but firm and cautious,

* Dugdale's Origines Juridicales, c. 8.

† Decretal, l. i. tit. xxxvii. c. 1. Wilkins, Concilia, t. ii. p. 4.

‡ Prynne has produced several extracts from the pipe rolls of Henry II. where a person has been fined quia placitavit de laico feodo in curia christianitatis. And a bishop of Durham is fined five hundred marks quia tenuit placitum *de advocatione cujusdam ecclesiæ* in curiâ christianitatis. Epistle dedicatory to Prynne's Records, vol. iii. Glanvil gives the form of a writ of prohibition to the spiritual court for inquiring de feodo laico, for it had jurisdiction over lands in frankalmoign. This is conformable to the constitutions of Clarendon, and shews that they were still in force, though Collier has the assurance to say, that they were repealed soon after Becket's death, supporting this also by a false quotation from Glanvil. Ecclesiast. Hist. vol. i. p. 380. Lyttleton's Henry II. vol. iii. p. 97.

§ Cum judicandi Christos domini nulla sit laicis attributa potestas, apud quos manet necessitas obsequendi. Wilkins, Concilia, t. i. p. 747.

‖ Id. ibid.; et. t. ii. p. 90.

favoured by the nobility, though not much by the king, the judges receded not a step, and ultimately fixed a barrier which the church was forced to respect.* In the ensuing reign of Edward I., an archbishop acknowledges the abstract right of the king's bench to issue prohibitions;† and the statute entitled Circumspectè agatis, in the thirteenth year of that prince, while by its mode of expression it seems designed to guarantee the actual privileges of spiritual jurisdiction, had a tendency, especially with the disposition of the judges, to preclude the assertion of some which are not therein mentioned. Neither the right of advowson nor any temporal contract are specified in this act as pertaining to the church; and accordingly the temporal courts have ever since maintained an undisputed jurisdiction over them.‡ They succeeded also partially

* Vide Wilkins, Concilia, t. ii. passim.

† Lacet prohibitiones hujusmodi a curia christianissimi regis nostri juste procul dubio, ut diximus, concedantur. Id. t. ii. p. 160 and p. 115. Yet after such an acknowledgement by Archbishop Peckham in the height of ecclesiastical power, and after a practice deducible from the age of Henry II., some protestants, as Archbishop Bancroft, (2 Inst. 609); Gibson, (preface to Codex Jur. Eccl.), Collier, (Ecclesiast. Hist. vol. i. p. 622.) have complained that the court of king's bench should put any limits to their claims of spiritual jurisdiction.

‡ The statute Circumspectè agatis, for it is acknowledged as a statute, though not drawn up in the form of one, is founded upon an answer of Edward I. to the prelates who had petitioned for some modification of prohibitions. Collier, always prone to exaggerate church authority, insinuates that the jurisdiction of the spiritual court over breaches of contract, even without oath, is preserved by this statute, but the express words of the king shew that none whatever was intended; and the archbishop complains bitterly of it afterwards. Wilkins, Concilia, t. ii. p. 118. Collier's Ecclesiast. History, vol. i. p. 487. So far from having any cognizance of civil contracts not confirmed by oath, to which I am not certain that the church ever pretended in any country, the spiritual court had no jurisdiction at all even where an oath had intervened, unless there was a deficiency of proof

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in preventing the impunity of crimes perpetrated by clerks. It was enacted by the statute of Westminster, in 1275, or rather a construction was put upon that act, which is obscurely worded, that clerks indicted for felony should not be delivered to their ordinary, until an inquest had been taken of the matter of accusation; and, if they were found guilty, that their real and personal estate should be forfeited to the crown. In later times, the clerical privilege was not allowed till the party had pleaded to the indictment, and been duly convict, as is the practice at present.'

Less vigorous in France.

The civil magistrates of France did not by any means exert themselves so vigorously for their emancipation. The same or rather worse usurpations existed, and the same complaints were made, under Philip Augustus, St. Louis, and Philip the Bold; but the laws of those sovereigns tend much more to confirm, than to restrain ecclesiastical encroachments.† Some limitations were attempted by the secular courts; and an historian gives us the terms of a confederacy among the French nobles in 1246, binding themselves by oath not to permit the spiritual judges to take cognizance of any matter, except heresy, marriage and usury.‡ Unfortunately, Louis IX. was almost as little dis-

by writing or witnesses Glanvil, l. x. c. 12. Constitut. Clarendon art. 15.

* 2 Inst. p. 163.

† It seems deducible from a law of Philip Augustus, Ordonnances des Rois, t. i. p. 39. that a clerk convicted of some heinous offences might be capitally punished after degradation; yet a subsequent ordinance, p. 43. renders this doubtful; and the theory of clerical immunity became afterwards more fully established.

‡ Matt. Paris, p. 629.

posed as Henry III. to shake off the yoke of ecclesiastical dominion. But other sovereigns in the same period, from various motives, were equally submissive.* Frederic II. explicitly adopts the exemption of clerks from criminal as well as civil jurisdiction of seculars.* And Alfonso X. introduced the same system in Castile; a kingdom where neither the papal authority nor the independence of the church had obtained any legal recognition until the promulgation of his code, which teems with all the principles of the canon law.† It is almost needless to mention that all ecclesiastical powers and privileges were incorporated with the jurisprudence of the kingdom of Naples, which, especially after the accession of the Angevin line, stood in a peculiar relation of dependence upon the holy see.‡

The vast acquisitions of landed wealth made for many ages by bishops, chapters and monasteries

restraints on alienations in mortmain.

* Statuimus, ut nullus ecclesiasticam personam, in criminali quæstione vel civili, trahere ad judicium seculare præsumat. Ordonnances des Rois de France, t. i. p. 611 where this edict is recited and approved by Louis Hutin. Philip the Bold had obtained leave from the pope to arrest clerks accused of heinous crimes, on condition of remitting them to the bishop's court for trial. Hist. du Droit Ecc. Franç. t. i. p. 426. A council at Bourges held in 1276 had so absolutely condemned all interference of the secular power with clerks, that the king was obliged to solicit this moderate favour. p. 421.

† Marina, Ensayo Historico-Critico sobre las siete Partidas, c. 720 &c. Hist. du Droit Eccles. Franç. t. i. p. 442.

‡ Giannone, l. xix. c. 5, l. xx. c. 8. One provision of Robert king of Naples is remarkable: it extends the immunity of clerks to their *concubines*. ibid.

Villani strongly censures a law made at Florence, in 1345, taking away the personal immunity of clerks in criminal cases. Though the state could make such a law, he says, it had no right to do so against the liberties of holy church. l. xii. c. 42.

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began at length to excite the jealousy of sovereigns. They perceived that, although the prelates might send their stipulated proportion of vassals into the field, yet there could not be that active co-operation which the spirit of feudal tenures required, and that the national arm was palsied by the diminution of military nobles. Again, the reliefs upon succession, and similar dues upon alienation, incidental to fiefs, were entirely lost when they came into the hands of these undying corporations, to the serious injury of the feudal superior. Nor could it escape reflecting men, during the contest about investitures, that if the church peremptorily denied the supremacy of the state over her temporal wealth, it was but a just measure of retaliation or rather self-defence that the state should restrain her further acquisitions. Prohibitions of gifts in mortmain, though unknown to the lavish devotion of the new kingdoms, had been established by some of the Roman emperors, to check the overgrown wealth of the hierarchy.* The first attempt at a limitation of this description in modern times was made by Frederic Barbarossa, who, in 1158, enacted that no fief should be transferred either to the church or otherwise, without the permission of the superior lord. Louis IX. inserted a provision of the same kind in his Establishments.† Castile had also laws of a similar tendency.‡ A licence from

* Giannone, l. iii.

† Ordonnances des Rois, p. 213. See too p. 303. and alibi. Du Cange, v. Manus morta *Amortissement*, in Denisart, and other French law-books. Fleury, Instit. au Droit, t. i. p. 350.

‡ Marina, Ensayo sobre las siete partidas, c. 235.

the crown is said to have been necessary in England before the conquest for alienations in mortmain; but however that may be, there seems no reason to imagine that any restraint was put upon them by the common law before Magna Charta; a clause of which statute was construed to prohibit all gifts to religious houses without the consent of the lord of the fee. And by the 7th Edw. I. alienations in mortmain are absolutely taken away, though the king might always exercise his prerogative of granting a licence, which was not supposed to be affected by the statute.

Boniface VIII.

It must appear, I think, to every careful inquirer, that the papal authority, though manifesting outwardly more show of strength every year, had been secretly undermined, and lost a great deal of its hold upon public opinion, before the accession of Boniface VIII. in 1294 to the pontifical throne. The clergy were rendered sullen by demands of money, invasions of the legal right of patronage, and unreasonable partiality to the mendicant orders; a part of the mendicants themselves had begun to declaim against the corruptions of the papal court: while the laity, subjects alike and sovereigns, looked upon both the head and the members of the hierarchy with jealousy and dislike. Boniface, full of inordinate arrogance and ambition, and not sufficiently sensible of this gradual change in human opinion, endeavoured to strain to a higher pitch the despotic pretensions of former pontiffs. As Gre-

* 2 Inst. p. 74. Blackstone, vol. ii. c. 18.

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gory VII. appears the most usurping of mankind till we read the history of Innocent III., so Innocent III. is thrown into shade by the superior audacity of Boniface VIII. But, independently of the less favourable dispositions of the public, he wanted the most essential quality for an ambitious pope, reputation for integrity. He was suspected of having procured through fraud the resignation of his predecessor Celestine V., and his harsh treatment of that worthy man afterwards seems to justify the reproach. His actions however display the intoxication of extreme self-confidence. If we may credit some historians, he appeared at the Jubilee in 1300, a festival successfully instituted by himself to throw lustre around his court and fill his treasury,* dressed in imperial habits, with the two swords borne before him, emblems of his temporal as well as spiritual dominion over the earth.†

His disputes with the king of England

It was not long after his elevation to the pontificate, before Boniface displayed his temper. The two most powerful sovereigns of Europe, Philip

The Jubilee was a centenary commemoration, in honour of St Peter and St Paul, established by Boniface VIII on the faith of an imaginary precedent a century before. The period was soon reduced to fifty years, and from thence to twenty-five, as it still continues. The court of Rome at the next jubilee will however read with a sigh the description given of that in 1300. Papa innumerabilem pecuniam ab iisdem recepit, quia die et nocte duo clerici stabant ad altare Sancti Pauli, tenentes in eorum manibus rastellos, rastellantes pecuniam infinitam Muratori. Plenary indulgences were granted by Boniface to all who should keep their jubilee at Rome, and I suppose are still to be had on the same terms. Matteo Villani gives a curious account of the throng at Rome in 1350.

† Giannone, l. xxi c. 3. Velly, t. vii. p. 149. I have not observed any good authority referred to for this fact, which is however in the character of Boniface.

the Fair and Edward the First, began at the same moment to attack in a very arbitrary manner the revenues of the church. The English clergy had, by their own voluntary grants, or at least those of the prelates in their name, paid frequent subsidies to the crown, from the beginning of the reign of Henry III. They had nearly in effect waived the ancient exemption, and retained only the common privilege of English freemen to tax themselves in a constitutional manner. But Edward I. came upon them with demands so frequent and exorbitant, that they were compelled to take advantage of a bull issued by Boniface, forbidding them to pay any contribution to the state. The king disregarded every pretext, and seizing their goods into his hands, with other tyrannical proceedings, ultimately forced them to acquiesce in his extortion. It is remarkable, that the pope appears to have been passive throughout this contest of Edward I. with his clergy. But it was far otherwise in France. Philip the Fair had imposed a tax on the ecclesiastical order without their consent, a measure perhaps unprecedented, yet not more odious than the similar exactions of the king of England. Irritated by some previous differences, the pope issued his bull known by the initial words Clericis laicos, absolutely forbidding the clergy of every kingdom to pay, under whatever pretext of voluntary grant, gift or loan, any sort of tribute to their government without his special permission. Though France was not particularly named, the king understood himself to be in-

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tended, and took his revenge by a prohibition to export money from the kingdom. This produced angry remonstrances on the part of Boniface; but the Gallican church adhered so faithfully to the crown, and shewed indeed so much willingness to be spoiled of their money, that he could not insist upon the most unreasonable propositions of his bull, and ultimately allowed that the French clergy might assist their sovereign by voluntary contributions, though not by way of tax.

For a very few years after these circumstances, the pope and king of France appeared reconciled to each other; and the latter even referred his disputes with Edward I. to the arbitration of Boniface, "as a private person, Benedict of Gaeta, (his proper name,) and not as pontiff;" an almost nugatory precaution against his encroachment upon temporal authority.* But a terrible storm broke out in the first year of the fourteenth century. A bishop of Pamiers, who had been sent as legate from Boniface with some complaint, displayed so much insolence, and such disrespect to-

* Walt Hemingford, p 150. The award of Boniface, which he expresses himself to make both as pope and Benedict of Gaeta, is published in Rymer, t ii p 819. and is very equitable Nevertheless, the French historians agree to charge him with partiality towards Edward, and mention several proofs of it, which do not appear in the bull itself Previous to its publication, it was allowable enough to follow common fame; but Velly, a writer always careless and not always honest, has repeated mere falsehoods from Mezeray and Baillet, while he refers to the instrument itself in Rymer, which disproves them Hist de France, t vii p 139. M. Gaillard, one of the most candid critics in history that France ever produced, pointed out the error of her common historians in the Mem de l'Académie des Inscriptions, t xxxix. p 642, and the editors of L'Art de vérifier les Dates have also rectified it

wards the king, that Philip, considering him as his own subject, was provoked to put him under arrest, with a view to institute a criminal process. Boniface, incensed beyond measure at this violation of ecclesiastical and legatine privileges, published several bulls addressed to the king and clergy of France, charging the former with a variety of offences, some of them not at all concerning the church, and commanding the latter to attend a council which he had summoned to meet at Rome. In one of these instruments, the genuineness of which does not seem liable to much exception, he declares in concise and clear terms that the king was subject to him in temporal as well as spiritual matters. This proposition had not hitherto been explicitly advanced, and it was now too late to advance it. Philip replied by a short letter in the rudest language, and ordered his bulls to be publicly burned at Paris. Determined however to shew the real strength of his opposition, he summoned representatives from the three orders of his kingdom. This is commonly reckoned the first assembly of the States General. The nobility and commons disclaimed with firmness the temporal authority of the pope, and conveyed their sentiments to Rome through letters addressed to the college of Cardinals. The clergy endeavoured to steer a middle course, and were reluctant to enter into an engagement not to obey the pope's summons; yet they did not hesitate unequivocally to deny his temporal jurisdiction.

The council however opened at Rome; and

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notwithstanding the king's absolute prohibition, many French prelates held themselves bound to be present. In this assembly Boniface promulgated his famous constitution, denominated Unam Sanctam. The church is one body, he therein declares, and has one head. Under its command are two swords, the one spiritual, the other temporal; that to be used by the supreme pontiff himself; this by kings and knights, by his licence and at his will. But the lesser sword must be subject to the greater, and the temporal to the spiritual authority. He concludes by declaring the subjection of every human being to the see of Rome to be an article of necessary faith.* Another bull pronounces all persons of whatever rank obliged to appear when personally cited before the audience or apostolical tribunal at Rome; "since such is our pleasure, who, by divine permission, rule the world." Finally, as the rupture with Philip grew more evidently irreconcileable, and the measures pursued by that monarch more hostile, he not only excommunicated him, but offered the crown of France to the emperor Albert I. This arbitrary transference of kingdoms was, like many other pretensions of that age, an improvement upon the right of deposing excom-

* Utraque est in potestate ecclesiæ, spiritalis scilicet gladius et materialis. Sed is quidem pro ecclesia, ille vero ab ecclesia exercendus: ille sacerdotis, is manu regum ac militum, sed ad nutum et patientiam sacerdotis. Oportet autem gladium esse sub gladio, et temporalem auctoritatem spirituali subjici potestati.—Porro subesse Romano pontifici omni humanæ creaturæ declaramus, dicimus, definimus et pronunciamus omnino esse de necessitate fidei. Extravagant. l. 1. tit. viii. c. 1.

municated sovereigns. Gregory VII. would not have denied, that a nation, released by his authority from its allegiance, must re-enter upon its original right of electing a new sovereign. But Martin IV. had assigned the crown of Aragon to Charles of Valois; the first instance, I think, of such an usurpation of power, but which was defended by the homage of Peter II., who had rendered his kingdom feudally dependent, like Naples, upon the holy see.* Albert felt no eagerness to realize the liberal promises of Boniface, who was on the point of issuing a bull, absolving the subjects of Philip from their allegiance, and declaring his forfeiture, when a very unexpected circumstance interrupted all his projects.

It is not surprizing, when we consider how unaccustomed men were in those ages to disentangle the artful sophisms, and detect the falsehoods in point of fact, whereon the papal supremacy had been established, that the king of France should not have altogether pursued the course most becoming his dignity and the goodness of his cause.

* Innocent IV. had, however, in 1245, appointed one Bolon, brother to Sancho II., king of Portugal, to be a sort of coadjutor in the government of that kingdom, injoining the Barons to honour him as their sovereign, at the same time declaring that he did not intend to deprive the king, or his lawful issue, if he should have any, of the kingdom. But this was founded on the request of the Portuguese nobility themselves, who were dissatisfied with Sancho's administration. Sext. Decretal. l. ii. tit. v. c. 2. Art de verifier les Dates, t. xi. p. 773.

Boniface invested James II. of Aragon with the crown of Sardinia, over which, however, the see of Rome had always pretended to a superiority, by virtue of the concession (probably spurious) of Louis the Debonair. He promised Frederick king of Sicily the empire of Constantinople, which, I suppose, was not a fief of the holy see. Giannone, l. xxi. c. 3.

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He gave too much the air of a personal quarrel with Boniface to what should have been a resolute opposition to the despotism of Rome. Accordingly, in an assembly of his states at Paris, he preferred virulent charges against the pope, denying him to have been legitimately elected, imputing to him various heresies, and ultimately appealing to a general council and a lawful head of the church. These measures were not very happily planned; and experience had always shewn, that Europe would not submit to change the common chief of her religion for the purposes of a single sovereign. But Philip succeeded in an attempt apparently more bold and singular. Nogaret, a minister who had taken an active share in all the proceedings against Boniface, was secretly dispatched into Italy, and joining with some of the Colonna family, proscribed as Ghibelins, and rancorously persecuted by the pope, arrested him at Anagnia, a town in the neighbourhood of Rome, to which he had gone without guards. This violent action was not, one would imagine, calculated to place the king in an advantageous light; yet it led accidentally to a favourable termination of his dispute. Boniface was soon rescued by the inhabitants of Anagnia; but rage brought on a fever, which ended in his death; and the first act of his successor, Benedict XI., was to reconcile the king of France to the holy see.*

* Velly, Hist de France, t viii p 109—258. Crevier, Hist de l'Universite de Paris, t ii p. 170 &c.

The sensible decline of the papacy is to be dated from the pontificate of Boniface VIII., who had strained its authority to a higher pitch than any of his predecessors. There is a spell wrought by uninterrupted good fortune, which captivates men's understanding, and persuades them, against reasoning and analogy, that violent power is immortal and irresistible. The spell is broken by the first change of success. *We* have seen the working and the dissipation of this charm with a rapidity to which the events of former times bear as remote a relation as the gradual processes of nature to her deluges and her volcanoes. In tracing the papal empire over mankind, we have no such marked and definite crisis of revolution. But slowly, like the retreat of waters, or the stealthy pace of old age, that extraordinary power over human opinion has been subsiding for five centuries. I have already observed, that the symptoms of internal decay may be traced farther back. But as the retrocession of the Roman terminus under Adrian gave the first overt proof of decline in the ambitious energies of that empire, so the tacit submission of the successors of Boniface VIII. to the king of France might have been hailed by Europe as a token that their influence was beginning to abate. Imprisoned, insulted, deprived eventually of life by the violence of Philip, a prince excommunicated, and who had gone all lengths in defying and despising the papal jurisdiction, Boniface had every

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claim to be avenged by the inheritors of the same spiritual dominion. When Benedict XI. rescinded the bulls of his predecessor, and admitted Philip the Fair to communion without insisting on any concessions, he acted perhaps prudently, but gave a fatal blow to the temporal authority of Rome.

Removal of papal court to Avignon. 1305

Benedict XI. lived but a few months, and his successor Clement V., at the instigation, as is commonly supposed, of the king of France, by whose influence he had been elected, took the extraordinary step of removing the papal chair to Avignon. In this city it remained for more than seventy years; a period which Petrarch and other writers of Italy compare to that of the Babylonish captivity. The majority of the cardinals was always French, and the popes were uniformly of the same nation. Timidly dependent upon the court of France, they neglected the interests, and lost the affections of Italy. Rome, forsaken by her sovereign, nearly forgot her allegiance; what remained of papal authority in the ecclesiastical territories was exercised by cardinal legates, little to the honour or advantage of the holy see. Yet the series of Avignon pontiffs were far from insensible to Italian politics. These occupied on the contrary the greater part of their attention. But engaging in them from motives too manifestly selfish, and being regarded as a sort of foreigners from birth and residence, they aggravated that unpopularity and bad reputation which from various other causes attached itself to their court.

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Though none of the supreme pontiffs after Boniface VIII. ventured upon such explicit assumptions of a general jurisdiction over sovereigns by divine right as he had made in his controversy with Philip, they maintained one memorable struggle for temporal power against the emperor Louis of Bavaria. Maxims long boldly repeated without contradiction, and engrafted upon the canon law, passed almost for articles of faith among the clergy, and those who trusted in them, and in despite of all ancient authorities, Clement V. laid it down, that the popes, having transferred the Roman empire from the Greeks to the Germans, and delegated the right of nominating an emperor to certain electors, still reserved the prerogative of approving the choice, and of receiving from its subject upon his coronation an oath of fealty and obedience.* This had a regard to Henry VII., who denied that his oath bore any such interpretation, and whose measures, much to the alarm of the court of Avignon, were directed towards the restoration of his imperial rights in Italy. Among other things, he conferred the rank

Contest of popes with Louis of Bavaria.

* Romani principes, &c. Romano pontifici, a quo approbationem personæ ad imperialis culmen studiosis apicem assumendæ, nec non unctionem, consecrationem et imperii coronam accipiunt, sua submittere capita non reputârunt indignum, sequi illi et eidem ecclesiæ, quæ a Græcis imperium transtulit in Germanos, et a qua ad certos eorum principes jus et potestas eligendi regem, in imperatorem postmodum promovendum, pertinet, adstringere vinculo juramenti, &c. Clement I. tit. ix. The terms of the oath, as recited in this constitution, do not warrant the pope's interpretation, but imply only that the emperor shall be the advocate or defender of the church.

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of vicar of the empire upon Matteo Visconti, lord of Milan. The popes had for some time pretended to possess that vicariate, during a vacancy of the empire; and after Henry's death, insisted upon Visconti's surrender of the title. Several circumstances, for which I refer to the political historians of Italy, produced a war between the pope's legate and the Visconti family. The emperor Louis sent assistance to the latter, as heads of the Ghibelin or imperial party. This interference cost him above twenty years of trouble. John XXII., a man as passionate and ambitious as Boniface himself, immediately published a bull, in which he asserted the right of administering the empire during its vacancy, even in Germany, as it seems from the generality of his expression, as well as of deciding in a doubtful choice of the electors, to appertain to the holy see; and commanded Louis to lay down his pretended authority, until the supreme jurisdiction should determine upon his election. Louis's election had indeed been questionable, but that controversy was already settled in the field of Muhldorf, where he had obtained a victory over his competitor the duke of Austria; nor had the pope ever interfered to appease a civil war during several years that Germany had been internally distracted by the dispute. The emperor not yielding to this per-
1323 emptory order was excommunicated, his vassals were absolved from their oath of fealty, and all treaties of alliance between him and foreign princes

annulled. Germany however remained firm; and if Louis himself had manifested more decision of mind, and uniformity in his conduct, the court of Avignon must have signally failed in a contest, from which it did not in fact come out very successful. But while at one time he went intemperate lengths against John XXII., publishing scandalous accusations in an assembly of the citizens of Rome, and causing a Franciscan friar to be chosen in his room, after an irregular sentence of deposition, he was always anxious to negotiate terms of accommodation, to give up his own active partizans, and to make concessions the most derogatory to his independence and dignity. From John indeed he had nothing to expect, but Benedict XII. would gladly have been reconciled, if he had not feared the kings of France and Naples, political adversaries of the emperor, who kept the Avignon popes in a sort of servitude. His successor, Clement VI. inherited the implacable animosity of John XXII. towards Louis, who died without obtaining the absolution he had long abjectly solicited.* CHAP. VII ECCLES. POWER.

Though the want of firmness in this emperor's character gave sometimes a momentary triumph to the popes, it is evident that their authority lost ground during the continuance of this struggle. Their right of confirming imperial elections was Spirit of resistance to papal usurpations

* Schmidt, Hist des Allemands, t iv p 446—536 seems the best modern authority for this contest between the empire and papacy See also Struvius, Corp Hist German. p 591.

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expressly denied by a diet held at Frankfort in 1338, which established as a fundamental principle, that the imperial dignity depended upon God alone, and that whoever should be chosen by a majority of the electors became immediately both king and emperor, with all prerogatives of that station, and did not require the approbation of the pope.* This law, confirmed as it was by subsequent usage, emancipated the German empire, which was immediately concerned in opposing the papal claims. But some who were actively engaged in these transactions took more extensive views, and assailed the whole edifice of temporal power which the Roman see had been constructing for more than two centuries. Several men of learning, among whom Dante, Ockham, and Marsilius of Padua, are the most conspicuous, investigated the foundations of this superstructure, and exposed their insufficiency.† Literature, too long the passive handmaid of spiritual despotism,

* Quòd imperialis dignitas et potestas immediatè ex solo Deo, et quòd de jure et imperii consuetudine antiquitus approbata postquam aliquis eligitur in imperatorem sive regem ab electoribus imperii concorditer, vel majori parte eorundem, statim ex solâ electione est rex verus et imperator Romanorum censendus et nominandus, et eidem debet ab omnibus imperio subjectis obediri, et administrandi jura imperii, et cætera faciendi, quæ ad imperatorem verum pertinent, plenariam habet potestatem, nec Papæ sive sedis apostolicæ aut alicujus alterius approbatione, confirmatione, auctoritate indiget vel consensu. Schmidt, p 513

† Giannone, l xxii c 8. Schmidt, t vi p 152 Dante was dead before these events, but his principles were the same Ockham had already exerted his talents in the same cause by writing, in behalf of Philip IV against Boniface, a dialogue between a knight and a clerk on the temporal supremacy of the church This is published among other tracts of the same class in Goldastus, Monarchia Imperii, p

began to assert her nobler birthright of minister- CHAP VII.
ing to liberty and truth. Though the writings of these opponents of Rome are not always reasoned upon very solid principles, they at least taught mankind to scrutinize what had been received with implicit respect, and prepared the way for more philosophical discussions. About this time a new class of enemies had unexpectedly risen up against the rulers of the church. These were a part of the Franciscan order, who had seceded from the main body, on account of alledged deviations from the rigour of their primitive rule. Their schism was chiefly founded upon a quibble about the right of property in things consumable, which they maintained to be incompatible with the absolute poverty prescribed to them.* This frivolous sophistry was united with the wildest fanaticism, and as John XXII. attempted to repress their follies by a cruel persecution, they proclaimed aloud the corruption of the church, fixed the name of Antichrist upon the papacy, and warmly supported the emperor Louis throughout all his contention with the holy see.*

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Meanwhile the popes who sat at Avignon con- Papacy of

13. This dialogue is translated entire in the Songe du Vergier, a more celebrated performance, ascribed to Raoul de Presles under Charles V.

* The schism of the rigid Franciscans or Fratricelli is one of the most singular parts of ecclesiastical history, and had a material tendency both to depress the temporal authority of the papacy, and to pave the way for the Reformation. It is fully treated by Mosheim, cent 13 and 14, and by Crevier, Hist de l'Universite de Paris, t. ii. p. 231—264 &c.

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Avignon popes.

tinued to invade with surprizing rapaciousness the patronage and revenues of the church. The mandats or letters directing a particular clerk to be preferred seems to have given place in a great degree to the more effectual method of appropriating benefices by reservation or provision, which was carried to an enormous extent in the fourteenth century. John XXII., the most insatiate of pontiffs, reserved to himself all the bishoprics in Christendom.* Benedict XII. assumed the privilege for his own life of disposing of all benefices vacant by cession, deprivation, or translation. Clement VI. naturally thought that his title was equally good with his predecessor's, and continued the same right for his own time; which soon became a permanent rule of the Roman chancery.† Hence the appointment of a prelate to a rich bishopric was generally but the first link in a chain of translation, which the pope could regulate according to his interest. Another capital innovation was made by John XXII. in the establishment of the famous tax, called annates, or first fruits of ecclesiastical benefices, which he imposed for his own benefit. These were one year's value, estimated according to a fixed rate in the books of the Roman chancery, and payable to the papal collectors throughout

* Fleury, Institutions, &c. t. 1 p. 368. F. Paul on Benefices, c. 37.

† F. Paul, c. 38. Translations of bishops had been made by the authority of the metropolitan, till Innocent III. reserved this prerogative to the holy see. De Marca, l. vi. c. 8.

Europe.* Various other devices were invented to obtain money, which these degenerate popes, abandoning the magnificent schemes of their predecessors, were content to seek as their principal object. John XXII. is said to have accumulated an almost incredible treasure, exaggerated perhaps by the ill-will of his contemporaries;† but it may be doubted whether even his avarice reflected greater dishonour on the church, than the licentious profuseness of Clement VI.‡

These exactions were too much encouraged by the kings of France, who participated in the plunder, or at least required the mutual assistance of the popes for their own imposts on the clergy. John XXII. obtained leave of Charles the Fair to levy a tenth of ecclesiastical revenues,§ and Clement VI., in return, granted two-tenths to Philip of Valois for the expenses of his war. A similar tax was raised by the same authority towards the ransom of John.‖ These were contributions for

* F. Paul, c. 38. Fleury, p. 424. De Marca, l. vi. c. 10. Pasquier, l. iii. c. 28. The popes had long been in the habit of receiving a pecuniary gratuity when they granted the pallium to an archbishop, though this was reprehended by strict men, and even condemned by themselves. De Marca, ibid. It is noticed as a remarkable thing of Innocent IV., that he gave the pall to a German archbishop, without accepting anything. Schmidt, t. iv. p. 172. The original and nature of annates is copiously treated in Lenfant, Concile de Constance, t. ii. p. 133.

† G. Villani puts this at 25,000,000 of florins, which it is hardly possible to believe. The Italians were credulous enough to listen to any report against the popes of Avignon. l. xi. c. 20. Giannone, l. xxi. c. 8.

‡ For the corruption of morals at Avignon during the secession, see De Sade, Vie de Pétrarque, t. i. p. 70, and several other passages.

§ Continuator Gul. de Nangis, in Spicilegio d'Achery, t. iii. p. 86 (folio edition): ita miserum ecclesiam, says this monk, unus tondet, alter excoriat.

‖ Fleury, Institut au Droit ecclesiastique, t. ii. p. 245. Villaret,

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national purposes unconnected with religion, which the popes had never before pretended to impose, and which the king might properly have levied with the consent of his clergy, according to the practice of England. But that consent might not always be obtained with ease, and it seemed a more expeditious method to call in the authority of the pope. A manlier spirit was displayed by our ancestors. It was the boast of England to have placed the first legal barrier to the usurpations of Rome, if we except the dubious and insulated Pragmatic Sanction of St. Louis, from which the practice of succeeding ages in France entirely deviate. The English barons had, in a letter addressed to Boniface VIII., absolutely disclaimed his temporal supremacy over their crown, which he had attempted to set up by intermeddling in the quarrel of Scotland.* This letter, it is remarkable, is nearly coincident in point of time with that of the French nobility, and the two combined may be considered as a joint protestation of both kingdoms, and a testimony to the general sentiment among the superior ranks of the laity. A very few years afterwards, the parliament of Carlisle wrote a strong remonstrance to Clement V. against the system of provisions and other extortions, including that of first fruits, which it was rumoured, they say, he

t ix. p 431 It became a regular practice for the king to obtain the pope's consent to lay a tax on his clergy, though he sometimes applied first to themselves. Garnier, t xx p 141

* Rymer, t ii p. 373 Collier, vol i p. 725

was meditating to demand.* But the court of Avignon was not to be moved by remonstrances; and the feeble administration of Edward II. gave way to ecclesiastical usurpations at home as well as abroad.† His magnanimous son took a bolder line. After complaining ineffectually to Clement VI. of the enormous abuse which reserved almost all English benefices to the pope, and generally for the benefit of aliens,‡ he passed in 1350 the famous statute of provisors. This act, reciting one supposed to have been made at the parliament of Carlisle, which, however, does not appear,§ and complaining in strong language of the mischief sustained through continual reservations of benefices, enacts that all elections and collations shall be free, according to law, and that, in case any provision or reservation should be made by the court of Rome, the king should for that turn have

* Rotuli Parliamenti, vol. i. p. 204. This passage, hastily read, has led Collier and other English writers, such as Henry and Blackstone, into the supposition that annates were imposed by Clement V. But the concurrent testimony of foreign authors refers this tax to John XXII., as the canon law also shews. Extravagant Communes, l. iii. tit. ii. c. 11.

† The statute called Articuli cleri, in 1316, was directed rather towards confirming than limiting the clerical immunity in criminal cases.

‡ Collier, p. 546.

§ It is singular, that Sir E. Coke should assert, that this act recites, and is founded upon the statute 35 E. I. De asportatis religiosorum, (2 Inst. 580,) whereas there is not the least resemblance in the words, and very little, if any, in the substance. Blackstone, in consequence, mistakes the nature of that act of Edward I., and supposes it to have been made against papal provisions, to which I do not perceive even an allusion. Whether any such statute was really made in the Carlisle parliament of 35 E. I. as is asserted both in 25 E. III. and in the roll of another parliament, 17 E. III. (Rot. Parl. t. ii. p. 144,) is hard to decide, and perhaps those who examine this point will have to chuse between wilful suppression and wilful interpolation.

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the collation of such benefice, if it be of ecclesiastical election or patronage.* This devolution to the crown, which seems a little arbitrary, was the only remedy that could be effectual against the connivance and timidity of chapters and spiritual patrons. We cannot assert that a statute so nobly planned was executed with equal steadiness. Sometimes by royal dispensation, sometimes by neglect or evasion, the papal bulls of provision were still obeyed, though fresh laws were enacted to the same effect as the former. It was found on examination in 1367, that some clerks enjoyed more than twenty benefices by the pope's dispensation.† And the parliaments both of this and of Richard II.'s reign invariably complain of the disregard shown to the statutes of provisors. This led to other measures, which I shall presently mention.

Return of popes to Rome.

The residence of the popes at Avignon gave very general offence to Europe, and they could not themselves avoid perceiving the disadvantage of absence from their proper diocese, the city of St. Peter, the source of all their claims to sovereign authority. But Rome, so long abandoned, offered but an inhospitable reception; Urban V. returned to Avignon, after a short experiment of the capital; and it was not till 1376, that the promise, often repeated and long delayed, of restoring the papal chair to the metropolis of Christendom, was ultimately fulfilled by Gregory XI. His

* 25 E. III. stat. 6 † Collier, p. 568

death, which happened soon afterwards, prevented, it is said, a second flight that he was preparing. This was followed by the great schism, one of the most remarkable events in ecclesiastical history. It is a difficult and by no means an interesting question to determine the validity of that contested election, which distracted the Latin church for so many years. All contemporary testimonies are subject to the suspicion of partiality in a cause where no one was permitted to be neutral. In one fact however there is a common agreement, that the cardinals, of whom the majority were French, having assembled in conclave for the election of a successor to Gregory XI., were disturbed by a tumultuous populace, who demanded with menaces a Roman, or at least, an Italian pope. This tumult appears to have been sufficiently violent to excuse, and in fact did produce, a considerable degree of intimidation. After some time, the cardinals made choice of the archbishop of Bari, a Neapolitan, who assumed the name of Urban VI. His election satisfied the populace, and tranquillity was restored. The cardinals announced their choice to the absent members of their college, and behaved towards Urban as their pope for several weeks. But his uncommon harshness of temper giving them offence, they withdrew to a neighbouring town, and protesting that his election had been compelled by the violence of the Roman populace, annulled the whole proceeding, and chose one of their own number, who took the pontifical name of Clement

Contested election of Urban VI. and Clement VII.
1377

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VII. Such are the leading circumstances which produced the famous schism. Constraint is so destructive of the essence of election, that suffrages given through actual intimidation ought, I think, to be held invalid, even without minutely inquiring whether the degree of illegal force was such as might reasonably overcome the constancy of a firm mind. It is improbable that the free votes of the cardinals would have been bestowed on the archbishop of Bari; and I should not feel much hesitation in pronouncing his election to have been void. But the sacred college unquestionably did not use the earliest opportunity of protesting against the violence they had suffered; and we may infer almost with certainty, that if Urban's conduct had been more acceptable to that body, the world would have heard little of the transient riot at his election. This however opens a delicate question in jurisprudence; namely, under what circumstances acts, not only irregular, but substantially invalid, are capable of receiving a retro-active confirmation by the acquiescence and acknowledgement of parties concerned to oppose them. And upon this, I conceive, the great problem of legitimacy between Urban and Clement will be found to depend.*

* Lenfant has collected all the original testimonies on both sides in the first book of his Concile de Pise. No positive decision has ever been made on the subject, but the Roman popes are numbered in the commonly received list, and those of Avignon are not. The modern Italian writers express no doubt about the legitimacy of Urban, the French at most intimate, that Clement's pretensions were not to be wholly rejected. But I am saying too much on a question so utterly unimportant

The Great Schism.

Whatever posterity may have judged about the pretensions of these competitors, they at that time shared the obedience of Europe in nearly equal proportions. Urban remained at Rome; Clement resumed the station of Avignon. To the former adhered Italy, the Empire, England, and the nations of the north; the latter retained in his allegiance France, Spain, Scotland, and Sicily. Fortunately for the church, no question of religious faith intermixed itself with this schism, nor did any other impediment to re-union exist, than the obstinacy and selfishness of the contending parties. As it was impossible to come to any agreement on the original merits, there seemed to be no means of healing the wound but by the abdication of both popes and a fresh undisputed election. This was the general wish of Europe, but urged with particular zeal by the court of France, and, above all, by the university of Paris, which esteems this period the most honourable in her annals. The cardinals however of neither obedience would recede so far from their party as to suspend the election of a successor upon a vacancy of the pontificate, which would have at least removed one-half of the obstacle. The Roman conclave accordingly placed three pontiffs successively, Boniface IX., Innocent VI., and Gregory XII. in the seat of Urban VI.; and the cardinals at Avignon upon the death of Clement in 1394 elected Benedict XIII., (Peter de Luna,) famous for his inflexible obstinacy in prolonging the schism. He repeatedly promised to sacrifice

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his dignity for the sake of union. But there was no subterfuge to which this crafty pontiff had not recourse in order to avoid compliance with his word, though importuned, threatened, and even besieged in his palace at Avignon. Fatigued by his evasions, France withdrew her obedience, and the Gallican church continued for a few years without acknowledging any supreme head. But this step, which was rather the measure of the university at Paris than of the nation, it seemed advisable to retract; and Benedict was again obeyed, though France continued to urge his resignation. A second subtraction of obedience, or at least declaration of neutrality, was resolved upon, as preparatory to the convocation of a general council. On the other hand, those who sat at Rome displayed not less insincerity. Gregory XII. bound himself by oath on his accession to abdicate when it should appear necessary. But while these rivals were loading each other with the mutual reproach of schism, they drew on themselves the suspicion of at least a virtual collusion in order to retain their respective stations. At length, the cardinals of both parties, wearied with so much dissimulation, deserted their masters, and summoned a general council to meet at Pisa.*

Council of Pisa, 1409

The council assembled at Pisa deposed both Gregory and Benedict, without deciding in any

* Villaret, Lenfant, Concile de Pise Crevier, Hist. de l'Université de Paris, t. iii.

respect as to their pretensions, elected Alexander V. by its own supreme authority. This authority, however, was not universally recognized; the schism, instead of being healed, became more desperate; for as Spain adhered firmly to Benedict, and Gregory was not without supporters, there were now three contending pontiffs in the church. A general council was still, however, the favourite and indeed the sole remedy; and John XXIII., successor of Alexander V., was reluctantly prevailed upon, or perhaps trepanned into convoking one to meet at Constance. In this celebrated assembly he was himself deposed; a sentence which he incurred by that tenacious clinging to his dignity, after repeated promises to abdicate, which had already proved fatal to his competitors. The deposition of John, confessedly a legitimate pope, may strike us as an extraordinary measure. But, besides the opportunity it might afford of restoring union, the council found a pretext for this sentence in his enormous vices, which indeed they seem to have taken upon common fame without any judicial process. The true motive, however, of their proceedings against him was a desire to make a signal display of a new system which had rapidly gained ground, and which I may venture to call the whig principles of the Catholic church. A great question was at issue, whether the polity of that establishment should be an absolute, or an exceedingly limited monarchy. The papal tyranny, long endured and still increasing, had excited an active spirit

Constance; 1414

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of reformation which the most distinguished ecclesiastics of France and other countries encouraged. They recurred, as far as their knowledge allowed, to a more primitive discipline than the canon law, and elevated the supremacy of general councils. But in the formation of these they did not scruple to introduce material innovations. The bishops have usually been considered the sole members of ecclesiastical assemblies. At Constance, however, sat and voted not only the chiefs of monasteries, but the ambassadors of all Christian princes, the deputies of universities, with a multitude of inferior theologians, and even doctors of law.* These were naturally accessible to the pride of sudden elevation, which enabled them to controul the strong, and humiliate the lofty. In addition to this, the adversaries of the court of Rome carried another not less important innovation. The Italian bishops, almost universally in the papal interests, were so numerous, that if suffrages had been taken by the head, their preponderance would have impeded any measures of transalpine nations towards reformation. It was determined, therefore, that the council should divide itself into four nations, the Italian, the German, the French and the English; each with equal rights, and

* Lenfant, Concile de Constance, t. i p 107 (edit. 1727) Crevier, t. iii p 405 It was agreed, that the ambassadors could not vote upon articles of faith, but only on questions relating to the settlement of the church But the second order of ecclesiastics were allowed to vote generally

that every proposition having been separately discussed, the majority of the four should prevail.* This revolutionary spirit was very unacceptable to the cardinals, who submitted reluctantly, and with a determination, that did not prove altogether unavailing, to save their papal monarchy by a dexterous policy. They could not, however, prevent the famous resolutions of the fourth and fifth sessions, which declare that the council has received, by divine right, an authority to which every rank, even the papal, is obliged to submit, in matters of faith, in the extirpation of the present schism, and in the reformation of the church both in its head and its members; and that every person, even a pope, who shall obstinately refuse to obey that council, or any other lawfully assembled, is liable to such punishment as shall be necessary.† These decrees are the great pillars of that moderate theory with respect to the papal authority, which distinguished the Gallican

* This separation of England, as a co-equal limb of the council, gave great umbrage to the French, who maintained that, like Denmark and Sweden, it ought to have been reckoned along with Germany. The English deputies came down with a profusion of authorities to prove the antiquity of their monarchy, for which they did not fail to put in requisition the immeasurable pedigrees of Ireland Joseph of Arimathea, who planted Christianity and his stick at Glastonbury, did his best to help the cause. The recent victory of Azincourt, I am inclined to think, had more weight with the council Lenfant, t. ii. p. 46

At a time when a very different spirit prevailed, the English bishops under Henry II and Henry III had claimed as a right, that no more than four of their number should be summoned to a general council Hoveden, p. 320, Carte, vol. ii. p. 84 This was like boroughs praying to be released from sending members to parliament.

† Id. p. 161. Crevier, t. iii. p. 117

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church, and is embraced, I presume, by almost all laymen and the major part of ecclesiastics on this side of the Alps. They embarrass the more popish churchmen as the Revolution does our English tories; some boldly impugn the authority of the council of Constance, while others chicane upon the interpretation of its decrees. Their practical importance is not, indeed, direct; universal councils exist only in possibility; but the acknowledgement of a possible authority paramount to the see of Rome has contributed, among other means, to check its usurpations.

The purpose for which these general councils had been required, next to that of healing the schism, was the reformation of abuses. All the rapacious exactions, all the scandalous venality of which Europe had complained, while unquestioned pontiffs ruled at Avignon, appeared light in comparison of the practices of both rivals during the schism. Tenths repeatedly levied upon the clergy, annates rigorously exacted and enhanced by new valuations, fees annexed to the complicated formalities of the papal chancery, were the means by which each half of the church was compelled to reimburse its chief for the subtraction of the other's obedience. Boniface IX., one of the Roman line, whose fame is a little worse than that of his antagonists, made a gross traffic of his patronage; selling the privileges of exemption from ordinary jurisdiction, of holding benefices in commendam, and other dispensations invented for

the benefit of the holy see.* Nothing had been attempted at Pisa towards reformation. At Constance the majority were ardent and sincere; the representatives of the French, German, and English churches met with a determined and, as we have seen, not always unsuccessful resolution to assert their ecclesiastical liberties. They appointed a committee of reformation, whose recommendations, if carried into effect, would have annihilated almost entirely that artfully constructed machinery by which Rome had absorbed so much of the revenues and patronage of the church. But men, interested in perpetuating these abuses, especially the cardinals, improved the advantages which a skilful government always enjoys in playing against a popular assembly. They availed themselves of the jealousies arising out of the division of the council into nations, which exterior political circumstances had enhanced. France, then at war with England whose pretensions to be counted as a fourth nation she had warmly disputed, and not well disposed towards the emperor Sigismund, joined with the Italians against the English and German members of the council in a matter of the utmost importance, the immediate election of a pope before the articles of reformation should be finally concluded. These two nations, in return united with the Italians to chuse the cardina

* Lenfant, Hist du Concile de Pise, passim Crevier, Villaret Schmidt, Collier

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Colonna, against the advice of the French divines, who objected to any member of the sacred college. The court of Rome were gainers in both questions. Martin V. the new pope, soon evinced his determination to elude any substantial reform. After publishing a few constitutions tending to redress some of the abuses that had arisen during the schism, he contrived to make separate conventions with the several nations, and as soon as possible dissolved the council.*

By one of the decrees past at Constance, another general council was to be assembled in five years, a second at the end of seven more, and from that time a similar representation of the church was to meet every ten years. Martin V. accordingly convoked a council at Pavia, which, on account of the plague, was transferred to Siena; but nothing of importance was transacted by this assembly.† That which he summoned seven years afterwards to the city of Basle had very different results. The pope, dying before the meeting of this council, was succeeded by Eugenius IV., who, anticipating the spirit of its discussions, attempted to crush its independence in the outset, by transferring the place of session to an Italian city. No point was reckoned so material in the contest between the popes and reformers, as whether a coun-

of Basle 1433—

* Lenfant, Concile de Constance The copiousness as well as impartiality of this work justly render it an almost exclusive authority. Crevier (Hist de l'Université de Paris, t iii) has given a good abridgement, and Schmidt, (Hist des Allemands, t v) is worthy of attention

† Lenfant, Guerre des Hussites, t i p 223

cil should sit in Italy or beyond the Alps.* The council of Basle began, as it proceeded, in open enmity to the court of Rome. Eugenius, after several years had elapsed in more or less hostile discussions, exerted his prerogative of removing the assembly to Ferrara, and from thence to Florence. For this he had a specious pretext in the negociation, then apparently tending to a prosperous issue, for the re-union of the Greek church; a triumph, however transitory, of which his council at Florence obtained the glory. On the other hand, the assembly at Basle, though much weakened by the defection of those who adhered to Eugenius, entered into compacts with the Bohemian insurgents, more essential to the interests of the church than any union with the Greeks, and completed the work begun at Constance by abolishing the annates, the reservations of benefices, and other abuses of papal authority. In this it received the approbation of most princes; but when, provoked by the endeavours of the pope to frustrate its decrees, it proceeded so far as to suspend and even to depose him, neither France nor Germany concurred in the sentence. Even the council of Constance had not absolutely asserted a right of deposing a lawful pope, except in case of heresy, though their conduct towards John could not otherwise be justified.* This question indeed of

* The council of Basle endeavoured to evade this difficulty, by declaring Eugenius a relapsed heretic. Lenfant, Guerre des Hussites, t. ii. p. 93. But, as the church could discover no heresy in his disagreement with that assembly, the sentence of deposition gained little

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ecclesiastical public law seems to be still undecided. The fathers of Basle acted however with greater intrepidity than discretion, and not perhaps sensible of the change that was taking place in public opinion, raised Amadeus, a retired duke of Savoy, to the pontifical dignity by the name of Felix V. They thus renewed the schism, and divided the obedience of the Catholic church for a few years. The empire however as well as France observed a singular and not very consistent neutrality, respecting Eugenius as lawful pope, and the assembly at Basle as a general council. England warmly supported Eugenius, and even adhered to his council at Florence; Aragon and some countries of smaller note acknowledged Felix. But the partizans of Basle became every year weaker; and Nicolas V., the successor of Eugenius, found no great difficulty in obtaining the cession of Felix, and terminating this schism. This victory of the court of Rome over the council of Basle nearly counterbalanced the disadvantageous events at Constance, and put an end to the project of fixing permanent limitations upon the head of the church by means of general councils. Though the decree that prescribed the convocation of a council every ten years was still unrepealed, no absolute monarchs have ever more dreaded to meet the repre-

strength by this previous decision. The bishops were unwilling to take this violent step against Eugenius; but the minor theologians, the democracy of the Catholic church, whose right of suffrage seems rather an anomalous infringement of episcopal authority, pressed it with much heat and rashness. See a curious passage on this subject in a speech of the Cardinal of Arles. Lenfant, t. II. p. 225.

sentatives of their people, that the Roman pontiffs have abhorred the name of those ecclesiastical synods; once alone, and that with the utmost reluctance, has the catholic church been convoked since the council of Basle; but the famous assembly to which I allude does not fall within the scope of my present undertaking.*

It is a natural subject of speculation, what would have been the effects of these universal councils, which were so popular in the fifteenth century, if the decree passed at Constance for their periodical assembly had been regularly observed. Many catholic writers, of the moderate or cisalpine school, have lamented their disuse, and ascribed to it that irreparable breach which the Reformation has made in the fabric of their church. But there is almost an absurdity in conceiving their permanent existence. What chemistry could have kept united such heterogeneous masses, furnished with every principle of mutual repulsion? Even in early times, when councils, though nominally general, were composed of the subjects of the Roman empire, they had been marked by violence and contradiction: what then could have been expected from the delegates of independent kingdoms, whose ecclesiastical polity, whatever may be said of the spiritual unity of the church, had

* There is not, I believe, any sufficient history of the council of Basle. Lenfant designed to write it from the original acts, but finding his health decline, intermixed some rather imperfect notices of its transactions with his history of the Hussite war, which is commonly quoted under the title of History of the Council of Basle. Schmidt, Crevier, Villaret, are still my other authorities.

CHAP. VII. ECCLES. POWER. long been so intimately blended with that of the state, to admit of any general control without its assent? Nor, beyond the zeal, unquestionably sincere, which animated their members, especially at Basle, for the abolition of papal abuses, is there anything to praise in their conduct, or to regret in their cessation. The statesman, who dreaded the encroachments of priests upon the civil government, the Christian, who panted to see his rites and faith purified from the corruption of ages, found no hope of improvement in these councils. They took upon themselves the pretensions of the popes whom they attempted to supersede. By a decree of the fathers at Constance, all persons, including princes, who should oppose any obstacle to a journey undertaken by the emperor Sigismund, in order to obtain the cession of Benedict, are declared excommunicated, and deprived of their dignities, whether secular or ecclesiastical.* Their condemnation of Huss and Jerome of Prague, and the scandalous breach of faith which they induced Sigismund to commit on that occasion, are notorious. But perhaps it is not equally so, that this celebrated assembly recognised by a solemn decree the flagitious principle which it had practised, declaring that Huss was unworthy, through his obstinate adherence to heresy, of any privilege; nor ought any faith or promise to be kept with him, by natural, divine, or human law, to the prejudice of the catholic religion.† It will be easy

* Lenfant, t. i. p. 439.

† Nec aliqua sibi fides aut promissio, de jure naturali, divino, et humano fuerit in prejudicium Ca-

to estimate the claims of this congress of theologians to our veneration, and to weigh the retrenchment of a few abuses against the formal sanction of an atrocious maxim.

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It was not however necessary for any government of tolerable energy to seek the reform of those abuses which affected the independence of national churches, and the integrity of their regular discipline, at the hands of a general council. Whatever difficulty there might be in overturning the principles founded on the decretals of Isidore, and sanctioned by the prescription of many centuries, the more flagrant encroachments of papal

tholicæ fidei observanda. Lenfant, t. 1. p 491.

This proposition is the great disgrace of the council in the affair of Huss. But the violation of his safe-conduct being a famous event in ecclesiastical history, and which has been very much disputed with some degree of erroneous statement on both sides, it may be proper to give briefly an impartial summary. 1. Huss came to Constance with a safe-conduct of the emperor, very loosely worded, and not directed to any individuals. Lenfant, t. 1. p. 59. 2 This pass however was binding upon the emperor himself, and was so considered by him, when he remonstrated against the arrest of Huss. Id. p. 73. 83. 3 It was not binding on the council, who possessed no temporal power, but had a right to decide upon the question of heresy. 4. It is not manifest by what civil authority Huss was arrested, nor can I determine how far the imperial safe-conduct was a legal protection within the city of Constance. 5. Sigismund was persuaded to acquiesce in the capital punishment of Huss, and even to make it his own act; (Lenfant, p. 409.) by which he manifestly broke his engagement. 6. It is evident, that in this he acted by the advice and sanction of the council, who thus became accessary to the guilt of his treachery.

The great moral to be drawn from the story of John Huss's condemnation is, that no breach of faith can be excused by our opinion of ill desert in the party, or by a narrow interpretation of our own engagements. Every capitulation ought to be construed favourably for the weaker side. In such cases, it is emphatically true, that if the letter killeth, the spirit should give life.

Gerson, the most eminent theologian of his age, and the coryphæus of the party that opposed the transalpine principles, was deeply concerned in this atrocious business. Crevier, p. 432.

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tyranny were fresh innovations, some within the actual generation others easily to be traced up, and continually disputed. The principal European nations determined, with different degrees indeed of energy, to make a stand against the despotism of Rome. In this resistance England was not only the first engaged, but the most consistent; her free parliament preventing, as far as the times permitted, that wavering policy to which a court is liable. We have already seen, that a foundation was laid in the statute of provisors under Edward III. In the next reign, many other measures tending to repress the interference of Rome were adopted; especially the great statute of præmunire, which subjects all persons bringing papal bulls for translation of bishops and other enumerated purposes into the kingdom to the penalties of forfeiture and perpetual imprisonment.* This act received, and probably was designed to receive, a larger interpretation than its language appears to warrant. Combined with the statute of provisors, it put a stop to the pope's usurpation of patronage, which had impoverished the church and kingdom of England for nearly two centuries. Several attempts were made to overthrow these enactments; the first parliament of Henry IV. gave a very large power to the king over the statute of provisors, enabling him even to annul it at his pleasure.† This however does not appear in the statute-book.

* 16 Ric. II. c. 5. † Rot. Parl. vol. iii. p. 428.

Henry indeed, like his predecessors, exercised rather largely his prerogative of dispensing with the law against papal provisions; a prerogative which, as to this point, was itself taken away by an act of his own, and another of his son Henry V.* But the statute always stood unrepealed; and it is a satisfactory proof of the ecclesiastical supremacy of the legislature, that in the concordat made by Martin V. at the council of Constance with the English nation, we find no mention of reservation of benefices, of annates, and the other principal grievances of that age;† our ancestors disdaining to accept by compromise with the pope any modification or even confirmation of their statute law. They had already restrained another flagrant abuse, the increase of first fruits by Boniface IX.; an act of Henry IV. forbidding any greater sum to be paid on that account than had been formerly accustomed.‡

Influence of Wickliffe's tenets.

It will appear evident to every person acquainted with the contemporary historians, and the proceedings of parliament, that besides partaking in the general resentment of Europe against the papal court, England was under the influence of a peculiar hostility to the clergy, arising from the disse-

* 7 H. IV. c. 8.; 3 H. V. c. 4. Martin V published an angry bull against the 'execrable statute' of præmunire; enjoining Archbishop Chicheley to procure its repeal. Collier, p. 653. Chicheley did all in his power; but the commons were always inexorable on this head, p. 636.: and the archbishop even incurred Martin's resentment by it. Wilkins, Concilia, t. iii. p. 483.

† Lenfant, t. ii. p. 444.

‡ 6 H. IV. c. 1.

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mination of the principles of Wickliffe.* All ecclesiastical possessions were marked for spoliation by the system of this reformer; and the house of commons more than once endeavoured to carry it into effect, pressing Henry IV. to seize the temporalities of the church for public exigencies.† This recommendation, besides its injustice, was not likely to move Henry, whose policy had been to sustain the prelacy against their new adversaries. Ecclesiastical jurisdiction was kept in better controul than formerly by the judges of common law, who, through rather a strained construction of the statute of præmunire, extended its penalties to the spiritual courts, when they transgressed their limits.‡ The privilege of clergy in criminal cases still remained; but it was acknowledged not to comprehend high treason.§

* See, among many other passages, the articles exhibited by the Lollards to parliament against the clergy in 1394. Collier gives the substance of them, and they are noticed by Henry: but they are at full length in Wilkins, t. iii. p. 221.

† Walsingham, p. 371. 379. Rot. Parl. 11 H. IV. vol. iii. p. 645. The remarkable circumstances detailed by Walsingham in the former passage, are not corroborated by any thing in the records. But as it is unlikely that so particular a narrative should have no foundation, Hume has plausibly conjectured that the roll has been wilfully mutilated. As this suspicion occurs in other instances, it would be desirable to ascertain, by examination of the original rolls, whether they bear any external marks of injury. The mutilators, however, if such there were, have left a great deal. The rolls of Henry IV. and V.'s parliaments are quite full of petitions against the clergy.

‡ 3 Inst. p. 121. Collier, vol. i. p. 668.

§ 2 Inst. p. 634. where several instances of priests executed for coining and other treasons are adduced. And this may also be inferred from 25 E. III. stat. 3. c. 4.; and from 4 H. IV. c. 3. Indeed the benefit of clergy has never been taken away by statute from high treason. This renders it improbable that Chief Justice Gascoyne should, as Carte tells us, vol. ii. p. 664. have refused to try Archbishop Scrope for treason, on

Germany, as well as England, was disappointed of her hopes of general reformation by the Italian party at Constance; but she did not supply the want of the council's decrees with sufficient decision. A concordat with Martin V. left the pope in possession of too great a part of his recent usurpations.* This however was repugnant to the spirit of Germany, which called for a more thorough reform with all the national roughness and honesty. The diet of Mentz during the continuance of the council of Basle adopted all those regulations hostile to the papal interests which occasioned the deadly quarrel between that assembly and the court of Rome.† But the German empire was betrayed by Frederic III., and deceived by an accomplished but profligate statesman, his secretary Æneas Sylvius. Fresh concordats, settled at Aschaffenburg in 1448, nearly upon the footing of those concluded with Martin V., surrendered great part of the independence for which Germany had contended. The pope retained his annates, or at least a sort of tax in their place; and instead of reserving benefices arbitrarily, he

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the ground that no one could lawfully sit in judgement on a bishop for his life. Whether he might have declined to try him as a peer, is another question. The pope excommunicated all who were concerned in Scrope's death, and it cost Henry a large sum to obtain absolution. But Boniface IX. was no arbiter of the English law. Edward IV. granted a strange charter to the clergy, not only dispensing with the statutes of præmunire, but absolutely exempting them from temporal jurisdiction in cases of treason as well as felony. Wilkins, Concilia, t. iii. p. 583. Collier, p. 678. This, however, being an illegal grant, took no effect, at least after his death.

* Lenfant, t. ii. p. 428. Schmidt, t. v. p. 131.

† Schmidt, t. v. p. 221. Lenfant.

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obtained the positive right of collation during six alternate months of every year. Episcopal elections were freely restored to the chapters, except in case of translation, when the pope still continued to nominate; as he did also, if any person, canonically unfit, were presented to him for confirmation.* Such is the concordat of Aschaffenburg, by which the catholic principalities of the empire have always been governed, though reluctantly acquiescing in its disadvantageous provisions. Rome, for the remainder of the fifteenth century, not satisfied with the terms she had imposed, is said to have continually encroached upon the right of election.† But she purchased too dearly her triumph over the weakness of Frederic III.; and the Hundred Grievances of Germany, presented to Adrian VI. by the diet of of Nuremberg in 1522, manifested the workings of a long treasured resentment, that had made straight the path before the Saxon reformer.

Papal encroachments on church of Castile.

I have already taken notice that the Castilian church was in the first ages of that monarchy nearly independent of Rome. But after many gradual encroachments, the code of laws promul-

* Schmidt, t. v. p. 250; t. vi. p. 94. &c. He observes that there is three times as much money at present as in the fifteenth century; if therefore the annates are now felt as a burthen, what must they have been? p. 113. To this Rome would answer; if the annates were but sufficient for the pope's maintenance at that time, what must they be now?

† Schmidt, p. 96. Æneas Sylvius, Epist. 369 and 371; and De Moribus Germanorum, p. 1041. 1061. Several little disputes with the pope indicate the spirit that was fermenting in Germany throughout the fifteenth century. But this is the proper subject of a more detailed ecclesiastical history, and should form an introduction to that of the Reformation.

gated by Alfonso X. had incorporated a great part of the Decretals, and thus given the papal jurisprudence an authority, which it no where else possessed, in national tribunals.* That richly endowed hierarchy was a tempting spoil. The popes filled up its benefices by means of expectatives and reserves with their own Italian dependents. We find the cortes of Palencia in 1388 complaining that strangers are beneficed in Castile, through which the churches are ill supplied, and native scholars cannot be provided, and requesting the king to take such measures in relation to this as the kings of France, Aragon and Navarre, who do not permit any but natives to hold benefices in their kingdoms. The king answered to this petition that he would use his endeavours to that end.† And this is expressed with greater warmth by a cortes of 1473, who declare it to be the custom of all Christian nations that foreigners should not be promoted to benefices, urging the discouragement of native learning, the decay of charity, the bad performance of religious rites and other evils arising from the non-residence of beneficed priests, and request the king to notify to the court of Rome, that no expectative or provision in favour of foreigners can be received in future.‡ This petition seems to have passed into a law; but I am ignorant of the consequences. Spain certainly took an active part

* Marina, Ensayo Historico-Critico, c. 220. &c.

† Id. Teoria de las Cortes, t. iii. p. 126.

‡ Id. t. ii. p. 264. Mariana, Hist. Hispan. l. xix c. 1.

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in restraining the abuses of pontifical authority at the councils of Constance and Basle; to which I might add the name of Trent, if that assembly were not beyond my province.

Checks on papal authority in France.

France, dissatisfied with the abortive termination of her exertions during the schism, rejected the concordat offered by Martin V. which held out but a promise of imperfect reformation.* She suffered in consequence the papal exactions for some years, till the decrees of the council of Basle prompted her to more vigorous efforts for independence, and Charles VII. enacted the famous Pragmatic Sanction of Bourges.† This has been deemed a sort of Magna Charta of the Gallican church; for though the law was speedily abrogated, its principle has remained fixed as the basis of ecclesiastical liberties. By the Pragmatic Sanction a general council was declared superior to the pope; elections of bishops were made free from all controul; mandats or grants in expectancy, and reservations of benefices were taken away; first fruits were abolished. This defalcation of wealth, which had now become dearer than power, could not be patiently borne at Rome. Pius II., the same Æneas Sylvius who had sold himself to oppose the council of Basle in whose service he had been originally distinguished, used every endeavour to procure the repeal of this ordinance. With Charles VII. he had no success; but

* Villaret, t. xv. p. 126.

† Idem, p. 263. Hist. du Droit Public Eccles. François, t. ii. p. 234. Fleury, Institutions au Droit. Cuvier, t. iv. p. 100. Pasquier, Recherches de la France, l. iii. c. 27.

Louis XI., partly out of blind hatred to his father's memory, partly from a delusive expectation that the pope would support the usurpation in Naples, repealed the Pragmatic Sanction.* This may be adduced, other proofs that Louis XI., even according to the measures of worldly wisdom, was not a wise politician. His people judged from better feelings; the parliament of Paris constantly refused to enregister the revocation of that favourite law, and it continued in many respects to be acted upon until the reign of Francis I.† At the States General of Tours, in 1484, the inferior clergy, seconded by the two other orders, earnestly requested that the Pragmatic Sanction might be confirmed; but the prelates were timid or corrupt, and the regent Anne was unwilling to risk a quarrel with the holy see.‡ This unsettled state continued, the Pragmatic Sanction neither quite enforced nor quite repealed, till Francis I. having accommodated the differences of his predecessor with Rome, agreed upon a final concordat with Leo X., the treaty that subsisted for almost three centuries between the papacy and the kingdom of France.§ Instead of capitular election or papal provision, a new method was devised for filling the vacancies of episcopal sees. The king was to nominate a fit

* Villaret, and Garnier, t. xvi. Crevier, t. iv. p. 266. 274.

† Garnier, t. xvi. p. 432.; t. xvii. p. 222. et alibi. Crevier, t. iv. p. 318. et alibi.

‡ Garnier, t. xix. p. 216. and 321.

§ Garnier, t. xxiii p. 151. Hist. du Droit Public Eccles. Fr. t. ii. p. 248. Fleury, Institutions au Droit, t. i. p. 107.

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person, whom the pope was to collate. The one obtained an essential patronage, the other preserved his theoretical supremacy. Annates were restored to the pope; a concession of great importance. He gave up his indefinite prerogative of reserving benefices, and received only a small stipulated patronage. This convention met with strenuous opposition in France; the parliament of Paris yielded only to force; the university hardly stopped short of sedition; the zealous Gallicans have ever since deplored it, as a fatal wound to their liberties. There is much exaggeration in this, as far as the relation of the Gallican church to Rome is concerned; but the royal nomination to bishoprics impaired of course the independence of the hierarchy. Whether this prerogative of the crown were upon the whole beneficial to France, is a problem that I cannot affect to solve; in this country there seems little doubt, that capitular elections, which the statute of Henry VIII. has reduced to a name, would long since have degenerated into the corruption of close boroughs; but the circumstances of the Gallican establishment may not have been entirely similar, and the question opens a variety of considerations, that do not belong to my present subject.

Liberties of the Gallican Church.

From the principles established during the schism, and in the Pragmatic Sanction of Bourges, arose the far-famed liberties of the Gallican church, which honourably distinguished her from other members of the Roman communion. These have been referred by French writers to a much earlier

sera; but, except so far as that country participated in the ancient ecclesiastical independence of all Europe, before the papal encroachments had subverted it, I do not see that they can be properly traced above the fifteenth century. Nor had they acquired even at the expiration of that age the precision and consistency which was given in later times by the constant spirit of the parliaments and universities, as well as by the best ecclesiastical authors, with little assistance from the crown, which, except in a few periods of disagreement with Rome, has rather been disposed to restrain the more zealous Gallicans. These liberties therefore do not strictly fall within my limits; and it will be sufficient to observe, that they depended upon two maxims; one, that the pope does not possess any direct or indirect temporal authority; the other, that his spiritual jurisdiction can only be exercised in conformity with such parts of the canon law as are received by the kingdom of France. Hence the Gallican church rejected a great part of the Sext and Clementines, and paid little regard to modern papal bulls, which in fact obtained validity only by the king's approbation.*

Ecclesiastical jurisdiction restrained.

The pontifical usurpations which were thus restrained, affected, at least in their direct operation, rather the church than the state; and temporal

* Fleury, Institutions au Droit, t. ii. p. 226, &c. and Discours sur les Libertés de l'Eglise Gallicane. The last editors of this dissertation go far beyond Fleury, and perhaps reach the utmost point in limiting the papal authority which a sincere member of that communion can attain. See notes, p. 417, and 445.

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governments would only have been half effective, if their national hierarchies had preserved their enormous jurisdiction.* England, in this also, began the work, and had made a considerable progress, while the mistaken piety or policy of Louis IX. and his successors had laid France open to vast encroachments. The first method adopted in order to check them was rude enough, by seizing the bishop's effects when he exceeded his jurisdiction.† This jurisdiction, according to the construction of churchmen, became perpetually larger: even the reforming council of Constance give an enumeration of ecclesiastical causes far beyond the limits acknowledged in England, or perhaps in France.‡ But the parliament of Paris, instituted in 1304, gradually es-

* It ought always to be remembered, that *ecclesiastical*, and not merely *papal*, encroachments are what civil governments and the laity in general have had to resist; a point, which some very zealous opposers of Rome have been willing to keep out of sight. The latter arose out of the former, and perhaps were in some respects less objectionable. But the true enemy is what are called High-church principles; be they maintained by a pope, a bishop, or a presbyter. Thus Archbishop Stratford writes to Edward III.: Duo sunt, quibus principaliter regitur mundus, sacra pontificalis auctoritas, et regalis ordinata potestas: in quibus est pondus tanto gravius et sublimius sacerdotum, quanto et de regibus illi in divino reddituri sunt examine rationem; et ideo scire debet regia celsitudo ex illorum vos dependere judicio, non illos ad vestram dirigi posse voluntatem. Wilkins, Concilia, t. iii. p. 663. This amazing impudence towards such a prince as Edward did not succeed; but it is interesting to follow the track of the star which was now rather receding, though still fierce.

† De Marca, De Concordantiâ, l. iv. c. 18.

‡ Id. c. 15. Lenfant, Conc. de Constance, t. ii. p. 331. De Marca, l. iv. c. 15. gives us passages from one Durandus, about 1309, complaining that the lay judges invaded ecclesiastical jurisdiction, and reckoning the cases subject to the latter, under which he includes feudal and criminal causes in some circumstances, and also those in which the temporal judges are in doubt; si quid ambiguum inter judices seculares oriatur.

tablished a paramount authority over ecclesiastical as well as civil tribunals. Their progress was indeed very slow. At a famous assembly in 1329 before Philip of Valois, his advocate-general, Peter de Cugnieres, pronounced a long harangue against the excesses of spiritual jurisdiction. This is a curious illustration of that branch of legal and ecclesiastical history. It was answered at large by some bishops, and the king did not venture to take any active measures at that time.* Several regulations were however made in the fourteenth century, which took away the ecclesiastical cognizance of adultery, of the execution of testaments, and other causes which had been claimed by the clergy.† Their immunity in criminal matters was straitened by the introduction of privileged cases, to which it did not extend; such as treason, murder, robbery, and other heinous offences.‡ The parliament began to exercise a judicial controul over episcopal courts. It was not however till the beginning of the sixteenth century, according to the best writers, that it devised its famous form of procedure, the appeal because of abuse.§ This, in the course of

CHAP. XI. SECT. III. Spiritual jurisdiction.

* Velly, t. viii. p. 234. Fleury, Institutions, t. ii. p. 12. Hist. du Droit Eccles. Franç. t. ii. p. 86.

† Villaret, t. xi. p. 182.

‡ Fleury, Institutions au Droit, t. ii. p. 138. In the famous case of Balue, a bishop and cardinal, whom Louis XI. detected in a treasonable intrigue, it was contended by the king that he had a right to punish him capitally. Du Clos, Vie de Louis XI. t. i. p. 422. Garnier, Hist. de France, t. xxii. p. 330. Balue was confined for many years in a small iron cage, which till lately was shewn in the castle of Loches.

§ Pasquier, l. iii. c. 33. Hist. du Droit Eccles. François, t. ii. p. 119. Fleury, Institutions au Droit

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time, and through the decline of ecclesiastical power, not only proved an effectual barrier against encroachments of spiritual jurisdiction, but drew back again to the lay court the greater part of those causes which by prescription, and indeed by law, had appertained to a different cognizance. Thus, testamentary, and even, in a great degree, matrimonial causes were decided by the parliament; and in many other matters, that body, being the judge of its own competence, narrowed, by means of the appeal because of abuse, the boundaries of the opposite jurisdiction.* This remedial process appears to have been more extensively applied than our English writ of prohibition. The latter merely restrains the interference of the ecclesiastical courts in matters which the law has not committed to them. But the parliament of Paris considered itself, I apprehend, as conservator of the liberties and discipline of the Gallican church; and interposed the appeal because of abuse whenever the spiritual court, even in its proper province, transgressed the canonical rules by which it ought to be governed.†

Decline of papal influence in Italy.

While the bishops of Rome were losing their general influence over Europe, they did not gain

Eccles. Francois, t. ii. p. 221. De Marca, De Concordantia Sacerdotii et Imperii, l. iv. c. 19. The last author seems to carry it rather higher.

* Fleury, Institutions, t. ii. p. 42. &c.

† De Marca, De Concordantia, l. iv. c. 9. Fleury, t. ii. p. 224. In Spain even now, says De Marca, bishops or clerks not obeying royal mandates that inhibit the excesses of ecclesiastical courts, are expelled from the kingdom and deprived of the rights of denizenship.

more estimation in Italy. It is indeed a problem of some difficulty, whether they derived any substantial advantage from their temporal principality. For the last three centuries, it has certainly been conducive to the maintenance of their spiritual supremacy, which, in the complicated relations of policy, might have been endangered by their becoming the subjects of any particular sovereign. But I doubt whether their real authority over Christendom in the middle ages was not better preserved by a state of nominal dependence upon the empire, without much effective controul on one side, or many temptations to worldly ambition on the other. That covetousness of temporal sway which, having long prompted their measures of usurpation and forgery, seemed, from the time of Innocent III. and Nicolas III., to reap its gratification, impaired the more essential parts of the papal authority. In the fourteenth and fifteenth centuries, the popes degraded their character by too much anxiety about the politics of Italy. The veil woven by religious awe was rent asunder, and the features of ordinary ambition appeared without disguise. For it was no longer that magnificent and original system of spiritual power, which made Gregory VII., even in exile, a rival of the emperor, which held forth redress where the law could not protect, and punishment where it could not chastise, which fell in sometimes with superstitious feeling, and sometimes with political interest. Many might believe that the pope could depose a schismatic prince, who

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were disgusted at his attacking an unoffending neighbour. As the cupidity of the clergy in regard to worldly estate had lowered their character every where, so the similar conduct of their head undermined the respect felt for him in Italy. The censures of the church; those excommunications and interdicts, which had made Europe tremble, became gradually despicable as well as odious, when they were lavished in every squabble for territory, which the pope was pleased to make his own.* Even the crusades, which had already been tried against the heretics of Languedoc, were now preached against all who espoused a different party from the Roman see in the quarrels of Italy. Such were those directed at Frederic II., at Manfred, and at Matteo Visconti, accompanied by the usual bribery, indulgences and remission of sins. The papal interdicts of the fourteenth century wore a different complexion from those of former times. Though tremendous to the imagination, they had hitherto been confined to spiritual effects, or to such as were connected with religion, as the prohibition of marriage and sepulture. But Clement V., on account of an attack made by the Venetians upon Ferrara in 1309, proclaimed the whole people infamous, and incapable for three

* In 1290, Pisa was put under an interdict for having conferred the signiory on the count of Montefeltro, and he was ordered, on pain of excommunication, to lay down the government within a month Muratori ad ann A curious style for the pope to adopt towards a free city! Six years before the Venetians had been interdicted, because they would not allow their gallies to be hired by the king of Naples. But it would be almost endless to quote every instance

generations of any office; their goods, in every part of the world, subject to confiscation, and every Venetian, wherever he might be found, liable to be reduced into slavery.* A bull in the same terms was published by Gregory XI. in 1376 against the Florentines.

From the termination of the schism, as the popes found their ambition thwarted beyond the Alps, it was diverted more and more towards schemes of temporal sovereignty. In these we do not perceive that consistent policy, which remarkably actuated their conduct as supreme heads of the church. Men generally advanced in years, and born of noble Italian families, made the papacy subservient to the elevation of their kindred, or to the interests of a local faction. For such ends they mingled in the dark conspiracies of that bad age, distinguished only by the more scandalous turpitude of their vices from the petty tyrants and intriguers with whom they were engaged. In the latter part of the fifteenth century, when all favourable prejudices were worn away, those who occupied the most conspicuous station in Europe disgraced their name by more notorious profligacy, than could be parallelled in the darkest age that had preceded; and at the moment beyond which this work is not carried, the invasion of Italy by Charles VIII., I must leave the pontifical throne in the possession of Alexander VI.

It has been my object in the present chapter to

* Muratori

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bring within the compass of a few hours perusal the substance of a great and interesting branch of history; not certainly with such extensive reach of learning as the subject might require, but from sources of unquestioned credibility. Unconscious of any partialities, that could give an oblique bias to my mind, I have not been very solicitous to avoid offence, where offence is so easily taken. Yet there is one misinterpretation of my meaning which I would gladly obviate. I have not designed, in exhibiting without disguise the usurpations of Rome during the middle ages, to furnish materials for unjust prejudice or unfounded distrust. It is an advantageous circumstance for the philosophical inquirer into the history of ecclesiastical dominion, that, as it spreads itself over the vast extent of fifteen centuries, the dependence of events upon general causes, rather than on transitory combinations or the character of individuals, is made more evident, and the future more probably foretold from a consideration of the past, than we are apt to find in political history. Five centuries have now elapsed, during every one of which the authority of the Roman see has successively declined. Slowly and silently receding from their claims to temporal power, the pontiffs hardly protect their dilapidated citadel from the revolutionary concussions of modern times, the rapacity of governments, and the growing averseness to ecclesiastical influence. But if thus bearded by unmannerly and threatening innovation, they should occasionally forget that cautious

policy which necessity has prescribed, if they should attempt, an unavailing expedient! to revive institutions which can be no longer operative, or principles that have died away, their defensive efforts will not be unnatural, nor ought to excite either indignation or alarm. A calm, comprehensive study of ecclesiastical history, not in such scraps and fragments as the ordinary partizans of our ephemeral literature obtrude upon us, is perhaps the best antidote to extravagant apprehensions. Those who know what Rome has once been are best able to appreciate what she is; those who have seen the thunderbolt in the hands of the Gregories and the Innocents, will hardly be intimidated at the sallies of decrepitude, the impotent dart of Priam amidst the crackling ruins of Troy.

CHAPTER VIII.

THE CONSTITUTIONAL HISTORY OF ENGLAND.

PART I.

The Anglo-Saxon Constitution—Sketch of Anglo-Saxon History—Succession to the Crown—Orders of Men—Thanes and Ceorls—Witenagemot—Judicial System—Division into Hundreds—County-Court—Trial by Jury—its Antiquity investigated—Law of Frank-pledge—its several Stages—Question of Feudal Tenures before the Conquest.

CHAP. VIII. PART I. ENGLISH CONSTITUTION.

No unbiassed observer, who derives pleasure from the welfare of his species, can fail to consider the long and uninterruptedly increasing prosperity of England as the most beautiful phænomenon in the history of mankind. Climate more propitious may impart more largely the mere enjoyments of existence; but in [illegible]ther region have the benefits that political institutions can confer been diffused over so extended a population; nor have any people so well reconciled the discordant elements of wealth, order, and liberty. These advantages are surely not owing to the soil of this island, nor to the latitude in which it is placed;

but to the spirit of its laws, from which, through various means, the characteristic independence and industriousness of our nation have been derived. The constitution, therefore, of England must be to inquisitive men of all countries, far more to ourselves, an object of superior interest; distinguished, especially, as it is from all free governments of powerful nations which history has recorded, by its manifesting, after the lapse of several centuries, not merely no symptom of irretrievable decay, but a more expansive energy. Comparing long periods of time, it may be justly asserted that the administration of government has progressively become more equitable, and the privileges of the subject more secure; and, though it would be both presumptuous and unwise to express an unlimited confidence as to the durability of liberties, which owe their greatest security to the constant suspicion of the people, yet, if we calmly reflect on the present aspect of this country, it will probably appear, that whatever perils may threaten our constitution are rather from circumstances altogether unconnected with it than from any intrinsic defects of its own. It will be the object of the ensuing chapter to trace the gradual formation of this system of government. Such an investigation, partially conducted, will detect errors diametrically opposite; those intended to impose on the populace, which, on account of their palpable absurdity and the ill faith with which they are usually proposed, I have seldom thought it worth while directly to repel;

and those which better informed persons are apt to entertain, caught from transient reading, and the misrepresentations of late historians, but easily refuted by the genuine testimony of ancient times.

Sketch of Anglo-Saxon history.

The seven very unequal kingdoms of the Saxon Heptarchy, formed successively out of the countries wrested from the Britons, were originally independent of each other. Several times, however, a powerful sovereign acquired a preponderating influence over his neighbours, marked perhaps by the payment of tribute. Seven are enumerated by Bede as having thus reigned over the whole of Britain; an expression which must be very loosely interpreted. Three kingdoms became at length predominant; those of Wessex, Mercia and Northumberland. The first rendered tributary the small estates of the South-East, and the second that of the Eastern Angles. But Egbert, king of Wessex, not only incorporated with his own monarchy the dependent kingdoms of Kent and Essex, but obtained an acknowledgement of his superiority from Mercia and Northumberland; the latter of which, though the most extensive of any Anglo-Saxon state, was too much weakened by its internal divisions to offer any resistance.* Still however the kingdoms of Mercia, East Anglia, and Northumberland remained under their ancient line of sovereigns; nor did either Egbert or his five immediate successors

* Chronicon Saxonicum, p. 70.

assume the title of any other crown than Wessex.*

The destruction of those minor states was reserved for a different enemy. About the end of the eighth century the northern pirates began to ravage the coast of England. Scandinavia exhibited in that age a very singular condition of society. Her population, continually redundant in those barren regions which gave it birth, was cast out in search of plunder upon the ocean. Those who loved not rather than famine embarked in large armaments under chiefs of legitimate authority, as well as approved valour. Such were the Sea-kings, renowned in the stories of the North; the younger branches commonly of royal families, who inherited, as it were, the sea for their patrimony. Without any territory but on the bosom of the waves, without any dwelling but their ships, these princely pirates were obeyed by numerous subjects, and intimidated mighty nations.† Their invasions of England became continually more formidable; and, as their confidence increased, they began first to winter, and ultimately to form permanent settlements in the country. By their command of the sea, it was easy for them to harass every part of an island

* Alfred denominates himself in his will, Occidentalium Saxorum rex; and Asserius never gives him any other name. But his son Edward the Elder takes the title of Rex Anglorum on his coins. Vid. Numismata Anglo-Saxon. in Hickes's Thesaurus, vol. ii.

† For these Vikingr, or Sea-kings, a new and interesting subject, I would refer to Mr. Turner's History of the Anglo-Saxons, in which valuable work almost every particular that can illustrate our early annals will be found.

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presenting such an extent of coast as Britain; the Saxons, after a brave resistance, gradually gave way, and were on the brink of the same servitude or extermination which their own arms had already brought upon the ancient possessors.

From this imminent peril, after the three dependent kingdoms, Mercia, Northumberland, and East Anglia, had been overwhelmed, it was the glory of Alfred to rescue the Anglo-Saxon monarchy. Nothing less than the appearance of a hero so undesponding, so enterprizing, and so just, could have prevented the entire conquest of England. Yet he never subdued the Danes, nor became master of the whole kingdom. The Thames, the Lea, the Ouse and the Roman road called Watling-street, determined the limits of Alfred's dominion.* To the north-east of this boundary were spread the invaders, still denominated the *armies* of East Anglia and Northumberland;† a name terribly expressive of foreign conquerors, who retained their warlike confederacy, without melting into the mass of their subject population. Three able and active sovereigns, Edward, Athelstan, and Edmund, the successors of Alfred, pursued the course of victory, and finally rendered the English monarchy co-extensive with the present limits of England. Yet even Edgar, the most powerful of the Anglo-Saxon kings, did not venture to interfere with the legal customs of his Danish subjects.‡

* Wilkins, Leges Anglo-Saxon. p. 47 Chron. Saxon. p. 99.

† Chronicon Saxon. passim.

‡ Wilkins, Leges Anglo-Saxon.

Under this prince, whose rare fortune as well as judicious conduct procured him the sirname of Peaceable, the kingdom appears to have reached its zenith of prosperity. But his premature death changed the scene. The minority and feeble character of Ethelred II. provoked fresh incursions of our enemies beyond the German sea. A long series of disasters, and the inexplicable treason of those to whom the public safety was entrusted, overthrew the Saxon line, and established Canute of Denmark upon the throne.

The character of the Scandinavian nations was in some measure changed from what it had been during their first invasions. They had embraced the Christian faith; they were consolidated into great kingdoms; they had lost some of that predatory and ferocious spirit which a religion invented, as it seemed, for pirates had stimulated. Those too who had long been settled in England became gradually more assimilated to the natives, whose laws and language were not radically different from their own. Hence the accession of a Danish line of kings produced neither any evil, nor any sensible change of polity. But the English still outnumbered their conquerors, and eagerly returned, when an opportunity arrived, to the ancient stock. Edward the Confessor, notwith-

p. 83. In 1064, after a revolt of the Northumbrians, Edward the Confessor renewed the laws of Canute. Chronic. Saxon. It seems now to be ascertained by the comparison of dialects, that the inhabitants from the Humber, or at least the Tyne, to the Firth of Forth, were chiefly Danes.

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standing his Norman favourites, was endeared by the mildness of his character to the English nation; and subsequent miseries gave a kind of posthumous credit to a reign not eminent either for good fortune or wise government.

Succession to the crown.

In a stage of civilization so little advanced as that of the Anglo-Saxons, and under circumstances of such incessant peril, the fortunes of a nation chiefly depend upon the wisdom and valour of its sovereigns. No free people, therefore, would entrust their safety to blind chance, and permit an uniform observance of hereditary succession to prevail against strong public expediency. Accordingly the Saxons, like most other European nations, while they limited the inheritance of the crown exclusively to one royal family, were not very scrupulous about its devolution upon the nearest heir. It is an unwarranted assertion of Carte, that the rule of the Anglo-Saxon monarchy was "lineal agnatic succession, the blood of the second son having no right until the extinction of that of the eldest."* Unquestionably the eldest son of the last king, being of full age, and not manifestly incompetent, was his natural and probable successor; nor is it perhaps certain, that he always waited for an election to take upon himself the rights of sovereignty; although the ceremony of coronation, according to the ancient form, appears to imply its necessity.

* Vol. i. p. 365. Blackstone has laboured to prove the same proposition; but his knowledge of English history was rather superficial.

But the public security in those times was thought incompatible with a minor king; and the artificial substitution of a regency, which stricter notions of hereditary right have introduced, had never occurred to so rude a people. Thus, not to mention those instances which the obscure times of the Heptarchy exhibit, Ethelred I., as some say, but certainly Alfred, excluded the progeny of their elder brother from the throne.* Alfred, in his testament, dilates upon his own title, which he builds upon a triple foundation, the will of his father, the compact of his brother Ethelred, and the consent of the West-Saxon nobility.† A similar objection to the government of an infant seems to have rendered Athelstan, notwithstanding his reputed illegitimacy, the public choice upon the death of Edward the Elder. Thus too the sons of Edmund I. were postponed to their uncle Edred, and, again, preferred to his issue. And happy might it have been for England if this exclusion of infants had always obtained. But upon the death of Edgar, the royal family wanted some prince of mature years to prevent the crown from resting upon the head of a child;‡ and hence the minorities of Edward II. and Ethelred II. led to

* Chronicon Saxon p 99 Hume says, that Ethelwald, who attempted to raise an insurrection against Edward the Elder, was son of Ethelbert. The Saxon Chronicle only calls him the king's cousin; which he would be as the son of Ethelred

† Spelman, Vita Alfredi, Appendix.

‡ According to the historian of Ramsey, a sort of interregnum took place on Edgar's death, his son's birth not being thought sufficient to give him a clear right during infancy. 3 Gale, xv Script. p. 413.

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misfortunes, which overwhelmed for a time both the house of Cerdic and the English nation.

The Anglo-Saxon monarchy, during its earlier period, seems to have suffered but little from that insubordination among the superior nobility, which ended in dismembering the empire of Charlemagne. Such kings as Alfred and Athelstan were not likely to permit it. And the English counties, each under its own alderman, were not of a size to encourage the usurpations of their governors. But when the whole kingdom was subdued there arose, unfortunately, a fashion of entrusting great provinces to the administration of a single earl. Notwithstanding their union, Mercia, Northumberland and East Anglia were regarded in some degree as distinct parts of the monarchy. A difference of laws, though probably but slight, kept up this separation. Alfred governed Mercia by the hands of a nobleman who had married his daughter Ethelfleda; and that lady, after her husband's death, held the reins with a masculine energy till her own; when her brother Edward took the province into his immediate command.* But from the æra of Edward II.'s accession, the provincial governors began to overpower the royal authority, as they had done upon the continent. England under this prince was not far removed from the condition of France under Charles the Bald. In the time of Edward the Confessor, the whole kingdom seems to have been divided among five

Influence of provincial governors.

* Chronicon Saxon

earls,* three of whom were Godwin and his sons Harold and Tostig. It cannot be wondered at, that the royal line was soon supplanted by the most powerful and popular of these leaders, a prince well worthy to have founded a new dynasty, if his eminent qualities had not yielded to those of a still more illustrious enemy.

Distribution into Thanes and Ceorls

There were but two denominations of persons above the class of servitude, Thanes and Ceorls; the owners and the cultivators of land, or rather perhaps, as a more accurate distinction, the gentry and the inferior people. Among all the northern nations, as is well known, the weregild, or compensation for murder, was the standard measure of the gradations of society. In the Anglo-Saxon laws, we find two ranks of freeholders; the first, called King's Thanes, whose lives were valued at 1200 shillings; the second of inferior degree, whose composition was half that sum.† That of a ceorl was 200 shillings. The nature of this distinction between royal and lesser thanes is very obscure; and I shall have something more to say of it presently. However the thanes in general, or Anglo-Saxon gentry, must have been very numerous. A law of Ethelred directs the sheriff to take twelve of the chief thanes in every hun-

* The word earl (eorl) meant originally a man of noble birth, as opposed to the ceorl. It was not a title of office till the eleventh century, when it was used as synonymous to aldermán, for a governor of a county or province. After the conquest, it superseded altogether the ancient title. Selden's Titles of Honour, vol. iii. p. 638. (edit. Wilkins,) and Anglo-Saxon writings passim.

† Wilkins, p. 40. 43. 64. 72. 101.

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dred, as his assessors on the bench of justice.* And from Domesday-book we may collect, that they had formed a pretty large class, at least, in some counties, under Edward the Confessor.† The composition for the life of a ceorl was, as has been said, 200 shillings. If this proportion to the value of a thane points out the subordination of ranks, it certainly does not exhibit the lower freemen in a state of complete abasement. The ceorl was not bound, as far as appears, to the land which he cultivated;‡ he was occasionally called upon to bear arms for the public safety;§ he was protected against personal injuries, or trespasses on his land;‖ he was capable of property, and of the privileges which it conferred. If he came to possess five hydes of land, (or about 600 acres,) with a church and mansion of his own, he was entitled to the name and rights of a thane.¶ I am however inclined to suspect, that the ceorl were sliding more and more towards a state of servitude before the conquest.** The natural tendency of such

Condition of the ceorls.

* Wilkins, p 117

† Domesday Book having been compiled by different sets of commissioners, their language has sometimes varied in describing the same class of persons. The *liberi homines*, of whom we find continual mention in some counties, were perhaps not different from the *thanes*, who occur in other places. But this subject is very obscure; and a clear apprehension of the classes of society mentioned in Domesday seems at present unattainable.

‡ Leges Alfredi, c. 33. in Wilkins. This text is not unequivocal; and I confess that a law of Ina (c. 39) has rather a contrary appearance.

§ Leges Inæ, c. 51. ibid.

‖ Leges Alfredi, c. 31. 35.

¶ Leges Athelstani, ibid. p. 70, 71.

** If the laws that bear the name of William are, as is generally supposed, those of his predecessor Edward, they were already annexed to the soil. p. 225.

times of rapine, with the analogy of a similar change in France, leads to this conjecture. And as it was part of those singular regulations which were devised for the preservation of internal peace, that every man should be enrolled in some tything, and be dependent upon some lord, it was not very easy for the ceorl to exercise the privilege (if he possessed it) of quitting the soil upon which he lived.

Notwithstanding this, I doubt whether it can be proved, by any authority earlier than that of Glanvil, whose treatise was written about 1180, that the peasantry of England were reduced to that extreme debasement, which our law-books call villenage, a condition which left them no civil rights with respect to their lord. For, by the laws of William the Conqueror, there was still a composition fixed for the murder of a villein or ceorl, the strongest proof of his being, as it was called, law-worthy, and possessing a rank, however subordinate, in political society. And this composition was due to his kindred, not to the lord.* Indeed, it seems positively declared in another passage, that the cultivators, though bound to remain upon the land, were only subject to certain services.† Again, the treatise denominated the Laws of Henry I., which, though not deserving that appellation, must be considered as a contemporary document, expressly mentions the twyhinder or villein as a

* Wilkins, p 221. † Ibid. p. 225.

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freeman.* 'Nobody can doubt that the *villani* and *bordarii* of Domesday Book, who are always distinguished from the serfs of the demesne, were the ceorls of Anglo-Saxon law.† And I presume that the socmen, who so frequently occur in that record, though far more in some counties than in others, were ceorls more fortunate than the rest, who by purchase had acquired freeholds, or by prescription and the indulgence of their lords had obtained such a property in the outlands allotted to them, that they could not be removed, and in many instances might dispose of them at pleasure. They are the root of a noble plant, the free socage tenants, or English yeomanry, whose independence has stamped with peculiar features both our constitution and our national character.'

British natives.

Beneath the ceorls in political estimation were the conquered natives of Britain. In a war so long and so obstinately maintained as that of the Britons against their invaders, it is natural to conclude, that in a great part of the country the original inhabitants were almost extirpated, and that the remainder were reduced into servitude. This, till lately, has been the concurrent opinion of our antiquaries; and with some qualification, I do not see why it should not still be received. In every kingdom of the continent, which was formed by the northern nations out of the Roman empire, the Latin language preserved its superiority, and

* Leges Henr I c 70 and 76 in Wilkins.

† Somner on Gavelkind, p 74.

has much more been corrupted through ignorance and want of a standard, than intermingled with their original idiom. But our own language is, and has been from the earliest times after the Saxon conquest, essentially Teutonic, and of the most obvious affinity to those dialects which are spoken in Denmark and Lower Saxony. With such as are extravagant enough to controvert so evident a truth it is idle to contend; and those who believe great part of our language to be borrowed from the Welsh may doubtless infer that great part of our population is derived from the same source. If we look through the subsisting Anglo-Saxon records, there is not very frequent mention of British subjects. But some undoubtedly there were in a state of freedom, and possessed of landed estate. A Welshman, (that is, a Briton,) who held five hydes, was raised, like a ceorl, to the dignity of thane.* In the composition, however, for their lives, and consequently in their rank in society, they were inferior to the meanest Saxon freeman. The slaves, who were frequently the objects of legislation, rather for the purpose of ascertaining their punishments, than of securing their rights, may be presumed, at least in early times, to have been part of the conquered Britons. For though his own crimes, or the tyranny of others, might possibly reduce a Saxon ceorl to this condition,† it is inconceivable that the lowest of those who won England with their swords

Slaves.

* Leges Inæ, p 18. Leg Athelst p. 71.

† Leges Inæ, c. 24.

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should in the establishment of the new kingdoms have been left destitute of personal liberty.

The great council by which an Anglo-Saxon king was guided in all the main acts of government bore the appellation of Wittenagemot, or the assembly of the wise men: All their laws express the assent of this council; and there are instances, where grants made without its concurrence have been revoked. It was composed of prelates and abbots, of the aldermen of shires, and as it is generally expressed, of the noble and wise men of the kingdom.* Whether the lesser thanes, or inferior proprietors of lands were entitled to a place in the national council, as they certainly were in the shire-gemot, or county-court, is not easily to be decided. Many writers have concluded, from a passage in the History of Ely, that no one, however nobly born, could sit in the wittenagemot, so late at least as the reign of Edward the Confessor, unless he possessed forty hydes of land, or about five thousand acres.† But the passage in question does not unequivocally relate to the wittenagemot; and being vaguely worded by an ignorant monk, who perhaps had never gone beyond his fens, ought not to be assumed as an incontrovertible testimony. Certainly so very high a qualification cannot be supposed to have been requisite in the kingdoms of the Heptarchy; nor do we find any collateral

The Wittenagemot.

* Leges Anglo-Saxon. in Wilkins, passim

† Quoniam illo quadraginta hydarum terræ dominium minimè obtineret, licet nobilis esset, inter proceres tunc numerari non potuit. 3 Gale, Scriptores, p. 513.

evidence to confirm the hypothesis. If, however, all the body of thanes or freeholders were admissible to the wittenagemot, it is unlikely that the privilege should have been fully exercised. Very few, I believe, at present, imagine that there was any representative system in that age; much less that the ceorls or inferior freemen had the smallest share in the deliberations of the national assembly. Every argument, which a spirit of controversy once pressed into this service, has long since been victoriously refuted.

Judicial power.

It has been justly remarked by Hume, that among a people who lived in so simple a manner as the Anglo-Saxons, the judicial power is always of more consequence than the legislative. The liberties of these Anglo-Saxon thanes were chiefly secured, next to their swords and their free spirits, by the inestimable right of deciding civil and criminal suits in their own county-court; an institution which having survived the Conquest, and contributed in no small degree to fix the liberties of England upon a broad and popular basis, by limiting the feudal aristocracy, deserves attention in following the history of the British constitution.

Division into Counties, Hundreds and Tythings.

The division of the kingdom into counties, and of these into hundreds and decennaries, for the purpose of administering justice, was not peculiar to England. In the early laws of France and Lombardy, frequent mention is made of the hundred court, and now and then of those petty village-magistrates, who in England were called tything-men. It has been usual to ascribe the

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establishment of this system among our Saxon ancestors to Alfred, upon the authority of Ingulfus, a writer contemporary with the Conquest. But neither the biographer of Alfred, Asserius, nor the existing laws of that prince bear testimony to the fact. With respect indeed to the division of counties, and their government by aldermen and sheriffs, it is certain, that both existed long before his time;* and the utmost that can be supposed, is that he might in some instances have ascertained an unsettled boundary. There does not seem to be equal evidence as to the antiquity of the minor divisions. Hundreds, I think, are first mentioned in a law of Edgar, and tythings in one of Canute.† But as Alfred, it must be remembered, was never master of more than half the kingdom, the complete distribution of England into these districts cannot, upon any supposition, be referred to him.

There is, indeed, a circumstance observable in this division which seems to indicate that it could not have taken place at one time, nor upon one system; I mean the extreme inequality of hundreds in different parts of England. Whether the name be conceived to refer to the number of free families, or of land-holders, or of petty vills, forming so many associations of mutual assurance or frankpledge, one can hardly doubt that, when the term

* Counties, as well as the alderman who presided over them, are mentioned in the laws of Ina, c 36.

† Wilkins, p. 87. 136. The former, however, refers to them as an ancient institution: quæratur centurse conventus, sicut antea institutum erat.

was first applied, a hundred of one or other of these were comprized, at an average reckoning, within the district. But it is impossible to reconcile the varying size of hundreds to any single hypothesis. The county of Sussex contains sixty-five; that of Dorset forty-three; while Yorkshire has only twenty-six; and Lancashire but six. No difference of population, though the south of England was undoubtedly far the best peopled, can be conceived to account for so prodigious a disparity. I know of no better solution, than that the divisions of the north, properly called wapentakes,* were planned upon a different system, and obtained the denomination of hundreds incorrectly, after the union of all England under a single sovereign.

Assuming, therefore, the name and partition of hundreds to have originated in the southern counties, it will rather, I think, appear probable, that they contained only an hundred free families, including the ceorls as well as their landlords. If we suppose none but the latter to have been numbered, we should find six thousand thanes in Kent, and six thousand five hundred in Sussex; a reckoning totally inconsistent with any probable estimate.† But though we have little direct testimony as to the population of those times, there is one passage which falls in very sufficiently with the former supposition. Bede says, that the kingdom of the South Saxons, comprehending Surrey

* Leges Edwardi Confess. c. 33.

† It would be easy to mention particular hundreds in these counties, so small as to render this supposition quite ridiculous

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as well as Sussex contained seven thousand families. The county of Sussex alone is divided into sixty-five hundreds, which comes at least close enough to prove, that free families, rather than proprietors, were the subjects of that numeration. And this is the interpretation of Du Cange and Muratori, as to the Centenæ and Decaniæ of their own ancient laws.

I cannot but feel some doubt, notwithstanding a passage in the laws ascribed to Edward the Confessor,* whether the tything-man ever possessed any judicial magistracy over his small district. He was, more probably, little different from a petty constable, as is now the case, I believe, wherever that denomination of office is preserved. The court of the hundred, not held, as on the continent, by its own centenarius, but by the sheriff of the county, is frequently mentioned in the later Anglo-Saxon laws. It was, however, to the county-court that an English freeman chiefly looked for the maintenance of his civil rights. In this assembly, held monthly, or at least more than once in the year, (for there seems some ambiguity or perhaps fluctuation as to this point,) by the bishop and the earl, or, in his absence, the sheriff, the oath of allegiance was administered to all freemen, breaches of the peace were inquired into, crimes were investigated, and claims were determined. I assign all

County-court.

* Leges Edwardi Confess. p. 203. Nothing, as far as I know, confirms this passage, which hardly tallies with what the genuine Anglo-Saxon documents contain as to the judicial arrangements of that period.

these functions to the county-court, upon the supposition that no other subsisted during the Saxon times, and that the separation of the sheriff's tourn for criminal jurisdiction had not yet taken place, which, however, I cannot pretend to determine.*

Suit in the county-court.

A very ancient Saxon instrument, recording a suit in the county-court under the reign of Canute, has been published by Hickes, and may be deemed worthy of a literal translation in this place. "It is made known by this writing, that in the shire-gemot (county-court) held at Agelnothes-stane, (Aylston in Herefordshire,) in the reign of Canute, there sat Athelstan the bishop, and Ranig the alderman, and Edwin his son, and Leofwin Wulfig's son; and Thurkil the White and Tofig came there on the king's business; and there were Bryning the sheriff, and Athelweard of Frome, and Leofwin of Frome, and Goodric of Stoke, and all the thanes of Herefordshire. Then came to the mote Edwin son of Enneawne, and sued his mother for some lands, called Weolintun and Cyrdeslea. Then the bishop asked, who would answer for his mother. Then answered Thurkil the White, and said that he would, if he knew the facts, which he did not. Then were seen in the mote three thanes, that belonged to Feligly, Fawley, (five miles from Aylston,) Leofwin of Frome, Ægelwig the Red, and Thinsig Stægthman; and they went to her, and inquired what she had to say about the lands

* This point is obscure; but I do not perceive that the Anglo-Saxon laws distinguish the civil from the criminal tribunal.

which her son claimed. She said that she had no land which belonged to him, and fell into a noble passion against her son, and calling for Leofleda her kinswoman, the wife of Thurkil, thus spake to her before them; 'This is Leofleda my kinswoman, to whom I give my lands, money, clothes, and whatever I possess after my life:' and this said, she thus spake to the thanes: 'Behave like thanes, and declare my message to all the good men in the mote, and tell them to whom I have given my lands, and all my possessions, and nothing to my son;' and bade them be witnesses to this. And thus they did, rode to the mote, and told all the good men what she had enjoined them. Then Thurkil the White addressed the mote, and requested all the thanes to let his wife have the lands which her kinswoman had given her; and thus they did, and Thurkil rode to the church of St. Ethelbert, with the leave and witness of all the people, and had this inserted in a book in the church."*

It may be presumed from the appeal made to the thanes present at the county-court, and is confirmed by other ancient authorities,† that all of them, and they alone, to the exclusion of

* Hickes, Dissertatio Epistolaris, p. 4. in Thesaurus Antiquitatum Septentrion. vol. III. Before the conquest, says Gurdon, (on Courts-Baron, p 589) grants were enrolled in the shire-book in public shire mote, after proclamation made for any to come in that could claim the lands conveyed; and this was as irreversible as the modern fine with proclamations, or recovery. This may be so; but the county-court has at least long ceased to be a court of record; and we would ask for proof of the assertion. The book kept in the church of St. Ethelbert, wherein Thurkil is said to have inserted the proceedings of the county-court, may or may not have been a public record.

† Id. p. 3. Leges Henr. Primi, c. 20.

inferior freemen, were the judges of civil controversies. The latter indeed were called upon to attend its meetings, or, in the language of our present law, were suitors to the court, and it was penal to be absent. But this was on account of other duties, the oath of allegiance which they were to take, or the frank-pledges into which they were to enter, not in order to exercise any judicial power; unless we conceive that the disputes of the ceorls were decided by judges of their own rank. It is more important to remark the crude state of legal process and inquiry, which this instrument denotes. Without any regular method of instituting or conducting causes, the county-court seems to have had nothing to recommend it but, what indeed is no trifling matter, its security from corruption and tyranny; and in the practical jurisprudence of our Saxon ancestors, even at the beginning of the eleventh century, we perceive no advance of civility and skill from the state of their own savage progenitors on the banks of the Elbe. No appeal could be made to the royal tribunal, unless justice was denied in the county-court.* This was the great constitutional judicature in all questions of civil right. In another instrument, published by Hickes, of the age of Ethelred II., the tenant of lands which were claimed in the king's court, refused to submit

* Leges Eadgari, p. 77.; Canuti, p. 136.; Henrici Primi, c. 34. I quote the latter freely as Anglo-Saxon, though posterior to the conquest; their spirit being perfectly of the former period.

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to the decree of that tribunal, without a regular trial in the county; which was accordingly granted.* There were, however, royal judges, who either by way of appeal from the lower courts, or in excepted cases, formed a paramount judicature; but how their court was composed under the Anglo-Saxon sovereigns, I do not pretend to assert.†

Trial by Jury.

It has been a prevailing opinion, that trial by jury may be referred to the Anglo-Saxon age, and common tradition has ascribed it to the wisdom of Alfred. In such an historical deduction of the English government as I have attempted, an institution so peculiarly characteristic deserves every attention to its origin; and I shall therefore produce the evidence which has been supposed to bear upon this most eminent part of our judicial system. The first text of the Saxon laws which may appear to have such a meaning is in those of Alfred. "If any one accuse a king's thane of homicide, if he dare to purge himself (ladian), let him do it along with twelve king's thanes. If any one accuse a thane of less rank (læssa maga) than a king's thane, let him purge himself along with eleven of his equals, and one king's thane."‡

* Dissertatio Epistolaris, p 5.

† Madox, History of the Exchequer, p. 65. will not admit the existence of any court analogous to the Curia Regis before the conquest; all pleas being determined in the county. There are however several instances of decisions before the king; and in some cases it seems that the wittenagemot had a judicial authority. Leges Canuti, p. 135, 136. Hu[illegible]ensis, p. 469. Chron. Sax. p. 169. In the Leges Henr. I. c. 10. the limits of the royal and local jurisdictions are defined, as to criminal matters, and seem to have been little changed since the reign of Canute. p. 135.

‡ Leges Alfredi, p. 47

This law, which Nicholson contends, can mean nothing but trial by jury, has been referred by Hickes to that ancient usage of compurgation, where the accused sustained his own oath by those of a number of his friends, who pledged their knowledge, or at least their belief of his innocence.*

In the canons of the Northumbrian clergy, we read as follows: "If a king's thane deny this, (the practice of heathen superstitions,) let twelve be appointed for him, and let him take twelve of his kindred, (or equals, *maga*,) and twelve British strangers; and if he fail, then let him pay for his breach of law twelve half-marcs: If a landholder (or lesser thane) deny the charge, let as many of his equals, and as many strangers be taken as for a royal thane; and if he fail, let him pay six half-marcs: If a ceorl deny it, let as many of his equals, and as many strangers be taken for him as for the others: and if he fail, let him pay twelve oræ for his breach of law."† It is difficult at first sight to imagine, that these thirty-six so selected were merely compurgators, since it seems absurd that the judge should name indifferent persons, who without inquiry were to make oath of a party's innocence. Some have therefore conceived, that in this and other instances where compurgators are mentioned, they were virtually jurors, who, before attesting the facts, were to

* Nicholson, Prefatio ad Leges Anglo-Saxon. Wilkinsii, p. 10. Hickes, Dissertatio Epistolaris.

† Wilkins, p. 100.

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inform their consciences by investigating them. There are however passages in the Saxon laws nearly parallel to that just quoted, which seem incompatible with this interpretation. Thus, by a law of Athelstan, if any one claimed a stray ox as his own, five of his neighbours were to be assigned, of whom one was to maintain the claimant's oath.* Perhaps the principle of these regulations, and indeed of the whole law of compurgation, is to be found in that stress laid upon general character, which pervades the Anglo-Saxon jurisprudence. A man of ill reputation was compelled to undergo a triple ordeal, in cases where a single one sufficed for persons of credit; a provision rather inconsistent with the trust in a miraculous interposition of Providence which was the basis of that superstition. And the law of frank-pledge proceeded upon the maxim that the best guarantee of every man's obedience to the government was to be sought in the confidence of his neighbours. Hence while some compurgators were to be chosen by the sheriff, to avoid partiality and collusion, it was still intended, that they should be residents of the vicinage, witnesses of the defendant's previous life, and competent to estimate the probability of his exculpatory oath. For the British strangers, in the canon quoted above, were certainly the original natives, more intermingled with their conquerors, probably, in the provinces north of the Humber than else-

* Leges Athelstani, p. 58.

where, and still denominated strangers, as the distinction of races was not done away.

If in this instance we do not feel ourselves warranted to infer the existence of trial by jury, still less shall we find even an analogy to it in an article of the treaty between England and Wales, during the reign of Ethelred II. "Twelve persons skilled in the law (lahmen), six English and six Welsh, shall instruct the natives of each country, on pain of forfeiting their possessions, if, except through ignorance, they give false information."* This is obviously but a regulation intended to settle disputes among the Welsh and English, to which their ignorance of each other's customs might give rise.

By a law of the same prince, a court was to be held in every wapentake, where the sheriff and twelve principal thanes should swear that they would neither acquit any criminal, nor convict any innocent person.† It seems more probable, that these thanes were permanent assessors to the sheriff, like the scabini so frequently mentioned in the early laws of France and Italy, than jurors indiscriminately selected. This passage, however, is stronger than those which have been already adduced; and it may be thought, perhaps, with justice, that at least the seeds of our present form of trial are discoverable in it. In the history of Ely, we twice read of pleas held before twenty-four judges in the court at Cambridge; which

* Leges Ethelredi, p. 125. † p. 117.

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seems to have been formed out of several neighbouring hundreds.*

But the nearest approach to a regular jury, which has been preserved in our scanty memorials of the Anglo-Saxon age, occurs in the history of the monastery of Ramsey. A controversy relating to lands between that society and a certain nobleman was brought into the county-court; when each party was heard in his own behalf. After this commencement, on account probably of the length and difficulty of the investigation, it was referred by the court to thirty-six thanes, equally chosen by both sides.† And here we begin to perceive the manner, in which those tumultuous assemblies, the mixed body of freeholders in their county-court, slid gradually into a more steady and more diligent tribunal. But this was not the work of a single age. In the Conqueror's reign, we find a proceeding very similar to the case of Ramsey, in which the suit had been commenced in the county-court, before it was found expedient to remit it to a select body of freeholders. In the reign of William Rufus, and down to that of Henry II. when the trial of writs of right by the grand assize was introduced, Hickes has discovered other instances of the original usage.‡ The language of Domesday Book lends some confirmation to its existence at the time of that survey; and even our common legal expression of trial by

* Hist. Eliensis, in Gale's Scriptores, t. iii. p. 471. and 478.

† Hist. Ramsey, id. p. 415.

‡ Hickesii Dissertatio Epistolaris, p. 33. 36.

the tendency appears to have derived from a period when the fond was literally popular.

In comparing the various passages which I have quoted, it is impossible not to be struck with the preference given to twelve, or some multiple of it, in fixing the number either of judges or compurgators. This was not peculiar to England. Spelman has produced several instances of it in the early German laws. And that number seems to have been regarded with equal veneration in Scandinavia.* It is very immaterial from what caprice or superstition this predilection arose. But its general prevalence shews that, in searching for the origin of trial by jury, we cannot rely for a moment upon any analogy which the mere number affords. I am induced to make this observation, because some of the passages which have been alleged by eminent men for the purpose of establishing the existence of that institution before the conquest, seem to have little else to support them.

Law of frank-pledge.

There is certainly no part of the Anglo-Saxon polity which has attracted so much the notice of modern times as the law of frank-pledge, or mutual responsibility of the members of a tything for each other's abiding the course of justice. This, like the distribution of hundreds and tythings themselves, and like trial by jury, has been gene-

* Spelman's Glossary, voc. Jurata. Du Cange, voc. Nembda. Edinb. Review, vol xxxi. p. 115.: a most learned and elaborate essay.

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rally attributed to Alfred; and of this, I suspect, we must also deprive him. It is not surprising, that the great services of Alfred to his people in peace and in war should have led posterity to ascribe every institution, of which the beginning was obscure, to his contrivance, till his fame has become almost as fabulous in legislation as that of Arthur in arms. The English nation redeemed from servitude, and their name from extinction; the lamp of learning refreshed, when scarce a glimmer was visible; the watchful observance of justice and public order; these are the genuine praises of Alfred, and entitle him to the rank he has always held in men's esteem, as the best and greatest of English kings. But of his legislation there is little that can be asserted with sufficient evidence; the laws of his time that remain are neither numerous nor particularly interesting; and a loose report of late writers is not sufficient to prove that he compiled a dom-boc, or general code for the government of his kingdom.

An ingenious and philosophical writer has endeavoured to found the law of frank-pledge upon one of those general principles to which he always loves to recur. "If we look upon a tything," he says, "as regularly composed of ten families, this branch of its police will appear in the highest degree artificial and singular; but if we consider that society as of the same extent with a town or village, we shall find that such a regulation is conformable to the general usage of barbarous nations,

and is founded upon their common notions of justice. A variety of instances are then brought forward, drawn from the customs of almost every part of the world, wherein the inhabitants of a district have been made answerable for crimes and injuries imputed to one of them.* But none of these fully resemble the Saxon institution of which we are treating. They relate either to the right of reprisals, exercised with respect to the subjects of foreign countries, or to the indemnification exacted from the district, as in our modern statutes which give an action in certain cases of felony against the hundred, for crimes which its internal police was supposed capable of preventing. In the Irish custom, indeed, which bound the head of a sept to bring forward every one of his kindred who should be charged with any heinous crime, we certainly perceive a strong analogy to the Saxon law, not as it latterly subsisted, but under one of its prior modifications. For I think that something of a gradual progression may be traced to the history of this famous police, by following the indications afforded by those laws through which alone we become acquainted with its existence.

The Saxons brought with them from their original forests at least as much roughness as any of the nations which overturned the Roman empire; and their long struggle with the Britons could not contribute to polish their manners. The royal

* Millar on the English Government, vol. i. p. 189.

CHAP. VIII. PART I. CONST. authority was weak; and little had been learned of the regular system of government, which the Franks and Lombards acquired from the provincial Romans, among whom they were mingled. No people were so much addicted to robbery, to tumultuous frays, and to feuds arising out of family revenge, as the Anglo-Saxons. Their statutes are filled with complaints that the public peace was openly violated, and with penalties which seem, by their repetition, to have been disregarded. The vengeance taken by the kindred of a murdered man was a sacred right, which no law ventured to forbid, though it was limited by those which established a composition, and by those which protected the family of the murderer from their resentment. Even the author of the laws ascribed to the Confessor speaks of this family warfare, where the composition had not been paid, as perfectly lawful.* But the law of composition tended probably to increase the number of crimes. Though the sums imposed were sometimes heavy, men paid them with the help of their relations, or entered into voluntary associations, the purposes whereof might often be laudable, but which were certainly susceptible of this kind of abuse. And many led a life of rapine, forming large parties of ruffians, who committed murder and robbery with little dread of punishment.

* Parentibus occisi fiat emendatio, vel guerra eorum portetur. Wilkins, p. 199. This, like many other parts of that spurious treatise, appears to have been taken from some older laws, or at least traditions. I do not conceive that this private revenge was tolerated by law after the conquest.

Against this disorderly condition of society, the wisdom of our English kings, with the assistance of their great councils, was employed in devising remedies, which ultimately grew up into a peculiar system. No man could leave the shire to which he belonged without the permission of its alderman.* No man could be without a lord, on whom he depended; though he might quit his present patron, it was under the condition of engaging himself to another. If he failed in this, his kindred were bound to present him in the county-court, and to name a lord for him themselves. Unless this were done, he might be seized by any one who met him as a robber.† Hence, notwithstanding the personal liberty of the peasants, it was not very practicable for one of them to quit his place of residence. A stranger guest could not be received more than two nights as such; on the third the host became responsible for his inmate's conduct.‡

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The peculiar system of frank-pledges seems to have passed through the following very gradual stages. At first an accused person was obliged to find bail for standing his trial.§ At a subsequent period his relations were called upon to become sureties for payment of the composition and other fines to which he was liable.‖ They were even subject to be imprisoned until payment was made, and this imprisonment was commutable for a cer-

* Leges Alfredi, c. 33.
† Leges Athelstani, p. 56.
‡ Leges Edwardi Confess. p. 202.
§ Leges Lotharii [regis Cantii] p. 8.
‖ Leges Edwardi Seniores, p. 53.

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tain sum of money. The next stage was to make persons already convicted, or of suspicious repute, give sureties for their future behaviour.* It is not till the reign of Edgar that we find the first general law, which places every man in the condition of the guilty or suspected, and compels him to find a surety, who shall be responsible for his appearance when judicially summoned.† This is perpetually repeated and enforced in later statutes, during his reign and that of Ethelred. Finally, the laws of Canute declare the necessity of belonging to some hundred and tything, as well as of providing sureties;‡ and it may, perhaps, be inferred, that the custom of rendering every member of a tything answerable for the appearance of all the rest, as it existed after the conquest, is as old as the reign of this Danish monarch.

It is by no means an accurate notion which the writer to whom I have already adverted has conceived, that "the members of every tything were responsible for the conduct of one another; and that the society, or their leader, might be prosecuted and compelled to make reparation for an injury committed by any individual." Upon this false apprehension of the nature of frank-pledges the whole of his analogical reasoning is founded. It is indeed an error very current in popular treatises, and which might plead the authority of some whose professional learning should have saved

* Leges Athelstani, p. 57. c. 6, 7, 8.

† Leges Eadgari, p. 78.

‡ Leges Canuti, p. 137.

from so obvious a misstatement. But in fact the members of a tything were no more than perpetual bail for each other. "The greatest security of the public order (say the laws ascribed to the Confessor) is that every man must bind himself to one of those societies which the English in general call freeborgs, and the people of Yorkshire ten men's tale."* This consisted in the responsibility of ten men, each for the other, throughout every village in the kingdom; so that if one of the ten committed any fault, the nine should produce him in justice; where he should make reparation by his own property or by personal punishment. If he fled from justice, a mode was provided, according to which the tything might clear themselves from participation in his crime or escape; in default of such exculpation, and the malefactor's estate proving deficient, they were compelled to make good the penalty. And it is equally manifest from every other passage in which mention is made of this ancient institution, that the obligation of the tything was merely that of permanent bail, responsible only indirectly for the good behaviour of their members.

Every freeman, above the age of twelve years, was required to be enrolled in some tything.† In order to enforce this essential part of police, the courts of the tourn and leet were erected, or rather perhaps separated from that of the county. The

* Leges Edwardi in Wilkins, p. 201.

† Leges Canut, p. 136.

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periodical meetings of these, whose object it was to inquire into the state of tythings, whence they were called the view of frank-pledge, are regulated in Magna Charta. But this custom, which seems to have been in full vigour when Bracton wrote, and is enforced by a statute of Edward II., gradually died away in succeeding times.* According to the laws ascribed to the Confessor, which are perhaps of insufficient authority to fix the existence of any usage before the conquest, lords, who possessed a baronial jurisdiction, were permitted to keep their military tenants and the servants of their household under their own peculiar frank-pledge.† Nor was any freeholder, in the age of Bracton, bound to be enrolled in a tything.

Feudal tenures whether known before the Conquest.

It remains only, before we conclude this sketch of the Anglo-Saxon system, to consider the once famous question respecting the establishment of feudal tenures in England before the conquest. The position asserted by Sir Henry Spelman in his Glossary, that lands were not held feudally before that period, having been denied by the Irish judges in the great case of tenures, he was compelled to draw up his treatise on Feuds, in which it is more fully maintained. Several other writers, especially

* Stat. 18 E. II. Traces of the actual view of frankpledge appear in Cornwall as late as the 10th of Henry VI. Rot. Parliam. vol. iv. p. 403. And indeed Selden tells us, (Janus Anglorum, t. u. p. 993.) that it was not quite obsolete in his time. The form may, for aught I know, be kept up in some parts of England at this day. For some reason which I cannot explain, the distribution by tens was changed into one by dozens. Britton, c. 29. and Stat. 18 E. II.

† p. 202.

Hickes, Madox, and Sir Martin Wright have taken the same side. But names equally respectable might be thrown into the opposite scale; and I think the prevailing bias of modern antiquaries is in favour of at least a modified affirmative as to this question.

Lands are commonly supposed to have been divided, among the Anglo-Saxons, into bocland and folkland. The former was held in full propriety, and might be conveyed by boc or written grant: the latter was occupied by the common people, yielding rent or other service, and perhaps without any estate in the land, but at the pleasure of the owner. These two species of tenure might be compared to freehold and copyhold, if the latter had retained its original dependence upon the will of the lord.* Bocland was devisable by will; it was equally shared among the children; it was capable of being entailed by the person under whose grant it was originally taken; and in case of a treacherous or cowardly desertion from the army, it was forfeited to the crown.†

It is an improbable, and even extravagant sup-

* This supposition may plead the great authorities of Somner and Lye, the Anglo-Saxon lexicographers, and appears to me far more probable than the theory of Sir John Dalrymple, in his Essay on Feudal Property, or that of the author of a discourse on the Bocland and Folkland of the Saxons, 1775, whose name, I think, was Ibbetson. The first of these supposes bocland to have been feudal, and folkland alodial; the second most strangely takes folkland for feudal. I cannot satisfy myself whether thainland and reveland, which occur sometimes in Domesday book, merely correspond with the other two denominations.

† Wilkins, p. 43. 145. The latter law is copied from one of Charlemagne's Capitularies. Baluze, p. 767.

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position, that all these hereditary estates of the Anglo-Saxon freeholders were originally parcels of the royal demesne, and consequently that the king was once the sole proprietor in his kingdom. Whatever partitions were made upon the conquest of a British province, we may be sure that the shares of the army were coeval with those of the general. The great mass of Saxon property could not have been held by actual beneficiary grants from the crown. However, the royal demesnes were undoubtedly very extensive. They continued to be so, even in the time of the Confessor, after the donations of his predecessors. And several instruments granting lands to individuals, besides those in favour of the church, are extant. These are generally couched in that style of full and unconditional conveyance, which is observable in all such charters of the same age upon the continent. Some exceptions, however, occur; the lands bequeathed by Alfred to certain of his nobles were to return to his family in default of male heirs; and Hickes is of opinion that the royal consent, which seems to have been required for the testamentary disposition of some estates, was necessary on account of their beneficiary tenure.*

All the freehold lands of England, except those of those belonging to the church, were subject to three great public burthens; military service in the king's expeditions, or at least in defensive war,† the repair of bridges, and that of royal for-

* Dissertatio Epistolaris, p. 60. † This duty is by some expressed

tenure. These obligations, and especially the first, have been sometimes thought to denote a feudal tenure. There is, however, a confusion into which we may fall by not sufficiently discriminating the rights of a king as chief lord of his vassals, and as sovereign of his subjects. In every country, the supreme power is entitled to use the arm of each citizen in the public defence. The usage of all nations agrees with common reason in establishing this great principle. There is nothing therefore peculiarly feudal in this military service of landholders; it was due from the alodial proprietors upon the continent, it was derived from their German ancestors, it had been fixed, probably, by the legislatures of the Heptarchy upon the first settlement in Britain.

It is material however to observe, that a thane forfeited his hereditary freehold by misconduct in battle; a penalty more severe than was inflicted upon alodial proprietors on the continent. We even find in the earliest Saxon laws, that the sithcundman, who seems to have corresponded to the inferior thane of later times, forfeited his land by neglect of attendance in war; for which an alodialist in France would only have paid his heribannum, or penalty.* Nevertheless, as the policy of different states may enforce the duties of subjects

...ata expeditio; by others, hostis propulsio, which seems to make no small difference. But, unfortunately, most of the military service which an Anglo-Saxon freeholder had to render was of the latter kind.

* Leges Inæ, p. 23. Du Cange, voc. Heribannum. By the laws of Canute, p. 135. a fine only was imposed for this offence.

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by more or less severe sanctions. I do not know that a law of forfeiture in such cases is to be considered as positively implying a feudal tenure.

But a much stronger presumption is afforded by passages that indicate a mutual relation of lord and vassal among the free proprietors. The most powerful subjects have not a natural right to the service of other freemen. But in the laws enacted during the Heptarchy, we find it hinted that the sithcundman, or petty gentleman, might be dependent on a superior lord.* This is more distinctly expressed in some ecclesiastical canons, apparently of the tenth century, which distinguish the king's thane from the landholder, who depended upon a lord.† Other proofs of this might be brought from the Anglo-Saxon laws.‡ It is not however sufficient to prove a mutual relation between the higher and lower order of gentry, in order to establish the existence of feudal tenures. For this relation was often personal, as I have mentioned more fully in another place, and bore the name of commendation. And no nation was so rigorous as the English in compelling every man, from the king's thane to the ceorl, to place himself under a lawful superior. Hence the question is not to be hastily decided on the credit of a few passages that express this gradation of dependence; feudal vassalage, the object of our inquiry, being of a *real*, not a *personal* nature, and resulting entirely from the tenure of particular

* p. 10. 23. † Wilkins, p. 101. ‡ p. 71. 144, 145.

lands. But it is not unlikely that the personal relation of client, if I may use that word, might in a multitude of cases be changed into that of vassal. And certainly many of the motives which operated in France to produce a very general commutation of allodial into feudal tenure might have a similar influence in England, where the disorderly condition of society made it the interest of every man to obtain the protection of some potent lord.

The word thane corresponds in its derivation to vassal; and the latter term is used by Asserius, the contemporary biographer of Alfred, in speaking of the nobles of that prince.* In their attendance, too, upon the royal court, and the fidelity which was expected from them, the king's thanes seem exactly to have resembled that class of followers, who, under different appellations, were the guards as well as courtiers of the Frank and Lombard sovereigns. But I have remarked that the word thane is not applied to the whole body of gentry in the more ancient laws, where the word *ceorl* is opposed to the *ceorl* or roturier, and that of *æthcundman*† to the royal thane. It would be

* Alfredus cum paucis suis nobilibus, et etiam cum quibusdam Comitibus et Vassallis p. 166 Nobilibus Vassallis Sumertunensis pagi. p. 167. Yet Hickes objects to the authenticity of a charter ascribed to Edgar, because it contains the word Vassallus, 'quam à Nortmannis Angli habuerunt.' Dissertatio Epistol. p. 7.

† Wilkins, p. 3. 7. 23, &c This is an obscure word, occurring only, I believe, during the Heptarchy Wilkins translates it, præpositus paganus, which gives a wrong idea But *geuth*, which is plainly the same word, is used in Alfred's translation of Bede for a gentleman or nobleman Where Bede uses comes, the Saxon is always geuth or geuthman; where princeps or dux occurs, the version

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too much to infer from the extension of this latter word to a large class of persons, that we should interpret it with a little attention to etymology, a very uncertain guide in almost all investigations.

For the age immediately preceding the Norman invasion, we cannot have recourse to better authority than Domesday Book. That incomparable record contains the names of every tenant, and the conditions of his tenure, under the Confessor, as well as the time of its compilation; and seems to give little countenance to the notion, that a radical change in the system of our laws had been effected during the interval. In almost every page, we meet with tenants either of the crown, or of other lords, denominated thanes, freeholders (liberi homines), or socagers (socmanni). Some of these, it is stated, might sell their lands to whom they pleased; others were restricted from alienation. Some, as it is expressed, might go with their lands whither they would; by which I understand the right of commending themselves to any patron of their choice. These of course could not be feudal tenants in any proper notion of that term. Others could not depart from the lord whom they served; not, certainly, that they were personally bound to the soil, but that so long as they retained it, the seigniory of the superior could not be defeated.*

is ealdorman. Selden's Titles of Honour, p. 643.

* It sometimes weakens a proposition, which is capable of innumerable proofs, to take a very few at random: yet the following

But I am not aware that military service is specified in any instance to be due from one of these tenants; though it is difficult to speak as to a negative proposition of this kind with any confidence. CHAP. VIII. PART I. ENGLISH CONST.

No direct evidence appears as to the ceremony of homage or the oath of fealty before the conquest. The feudal exaction of aid in certain prescribed cases seems to have been unknown. Still less could those of wardship and marriage prevail, which were no parts of the great feudal system, but introduced, and perhaps invented, by our rapacious Norman tyrants. The English lawyers, through an imperfect acquaintance with the history of feuds upon the continent, have treated these unjust innovations as if they had formed essential parts of the system, and sprung naturally from the relation between lord and vassal. And, with reference to the present question, Sir Henry Spelman has certainly laid too much stress upon them in concluding that feudal tenures did not exist among the Anglo-Saxons, because their lands were not in ward, nor their persons sold in

casual specimens will illustrate the common language of Domesday Book.

Hæc tria maneria tenuit Ulveva tempore regis Edwardi et potuit ire cum terrâ quò volebat. p. 85.

Toti emit eam T. R. E. (temp. regis Edwardi) de ecclesiâ Malmsburiensi ad ætatem trium hominum; et infra hunc terminum poterat ire cum eâ ad quem vellet dominum. p. 72.

Tres Angli tenuerunt Darneford T. R. E. et non poterant ab ecclesiâ separari. Duo ex iis reddebant v solidos, et tertius serviebat sicut Thainus. p. 68.

Has terras qui tenuerunt T. R. E. quò voluerunt ire potuerunt, præter unum Seric vocatum, qui in Ragendal tenuit iii carucatas terræ; sed non poterat cum eâ alicubi recedere. p. 235.

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marriage. But I cannot equally [illegible] this eminent person in denying the existence of reliefs during the same period. If the heriot, which is sometimes mentioned in the reign of Edgar,* (though it may probably have been an established custom long before,) were not identical with the relief, it bore at least a very strong analogy to it. A charter of Ethelred's interprets one word by the other.† In the laws of William, which re-enact those of Canute concerning heriots, the term relief is employed as synonymous.‡ Though the heriot was in later times paid in chattels, the relief in money, it is equally true that originally the law fixed a sum of money in certain cases for the heriot, and a chattel for the relief. And the most plausible distinction alledged by Spelman, that the heriot is by law due from the personal estate, but the relief from the heir, seems hardly applicable to that remote age, when the law of succession as to real and personal estate was not different.

It has been shewn in another place, how the right of territorial jurisdiction was generally, and at last inseparably, connected with feudal tenure. Of this right we meet frequent instances in the laws and records of the Anglo-Saxons, though not in those of an early date. A charter of Edred grants to the monastery of Croyland soc, sac, toll, team and infangthef; words which generally

* Selden's Works, vol. ii. p. 1620.

† Hist. Ramseyens. p. 430.

‡ Leges Canuti, p. 344. Leges Guliel. p. 293.

went together in the description of these privileges, and signify the right of holding a court to which all freemen of the territory should repair, of deciding pleas therein, as well as of imposing amercements according to law, of taking tolls upon the sale of goods, and of punishing capitally a thief taken in the fact within the limits of the manor.* Another charter from the Confessor grants to the abbey of Ramsey similar rights over all who were suitors to the sheriff's court, subject to military service, and capable of landed possessions; that is, as I conceive, all who were not in servitude.† By a law of Ethelred, none but the king could have jurisdiction over a royal thane.‡ And Domesday Book is full of decisive proofs, that the English lords had their courts wherein they rendered justice to their suitors, like the continental nobility; privileges which are noticed with great precision in that record, as part of the statistical survey. For the right of jurisdiction at a time when punishments were almost wholly pecuniary, was a matter of property, and sought from motives of rapacity as well as pride.

Whether therefore the law of feudal tenures

* Ingulfus, p. 35. I do not pretend to assert the authenticity of these charters, which at all events are nearly as old as the conquest. Hickes calls most of them in question. Dissert. Epist. p. 66.: but some later antiquaries seem to have been more favourable. Archæologia, vol. xviii. p. 49. Nouveau Traité de Diplomatique, t. i. p. 348.

† Hist. Ramsey, p. 454.

‡ p. 118. This is the earliest allusion, if I am not mistaken, to territorial jurisdiction in the Saxon laws. Probably it was not frequent till near the end of the tenth century.

can be said to have existed in England before the conquest must be left to every reader's determination. Perhaps any attempt to decide it positively would end in a verbal dispute. In tracing the history of every political institution, three things are to be considered, the principle, the form, and the name. The last will probably not be found in any genuine Anglo-Saxon record.* Of the form, or the peculiar ceremonies and incidents of a regular fief, there is some, though not much appearance. But those who reflect upon the dependence in which free and even noble tenants held their estates of other subjects, and upon the privileges of territorial jurisdiction, will, I think, perceive much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman conquest.

* Feodum twice occurs in the testament of Alfred; but it does not appear to be used in its proper sense, nor do I apprehend that instrument to have been originally written in Latin. It was much more consonant to Alfred's practice to employ his own language.

PART II.

THE ANGLO-NORMAN CONSTITUTION

The Anglo-Norman Constitution—Causes of the Conquest—Policy and Character of William—his Tyranny—Introduction of Feudal Services—Difference between the Feudal Governments of France and England—Causes of the great Power of the first Norman Kings—Arbitrary Character of their Government—Great Council—Resistance of the Barons to John—Magna Charta—its principal Articles—Reign of Henry III.—The Constitution acquires a more liberal Character—Judicial System of the Anglo-Normans—Curia Regis, Exchequer, &c.—Establishment of the Common Law—its Effect in fixing the Constitution—Remarks on the Limitation of Aristocratical Privileges in England.

Conquest of England by William.

It is deemed by William of Malmsbury an extraordinary work of Providence, that the English should have given up all for lost after the battle of Hastings, where only a small though brave army had perished.* It was indeed the conquest of a great kingdom by the prince of a single pro-

* Malmsb. p. 53. And Henry of Huntingdon says emphatically: Millesimo et sexagesimo sexto anno gratiæ, perfecit dominator Deus de gente Anglorum quod diu cogitaverat. Cuncti namque Normannorum asperæ et callidæ tradidit eos ad exterminandum. p. 210.

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vince, an event not easily parallelled, where the vanquished were little, if at all, less courageous than their enemies, [illegible] where no domestic factions exposed the country to the invader. Yet William was so advantageously [illegible], that his success seems neither unaccountable nor a matter of discredit to the English nation. The heir of the house of Cerdic had been already set aside at the election of Harold; and his youth, joined to a mediocrity of understanding which excited neither esteem nor fear,* gave no encouragement to the scheme of placing him upon the throne in those moments of imminent peril which followed the battle of Hastings. England was peculiarly destitute of great men. The weak reigns of Ethelred and Edward had rendered the government a mere oligarchy and reduced the nobility into the state of retainers to a few leading houses, the representatives of which were every way unequal to meet such an enemy as the duke of Normandy. If indeed the concurrent testimony of historians does not exaggerate his forces, it may be doubted whether England possessed military resources sufficient to have resisted so numerous and well-appointed an army.

This forlorn state of the country induced, if it did not justify, the measure of tendering the crown

* Edgar, after one or two ineffectual attempts to recover the kingdom, was treated by William with a kindness which could only have proceeded from contempt of his understanding; for he was not wanting in courage. He became the intimate friend of Robert duke of Normandy, whose sentiments, as well as character, much resembled his own.

to William, which he had a pretext or title to claim, arising from the intentions, perhaps the promise, perhaps even the testament of Edward, which had more weight in those times than it deserved, and was at least better than the naked title of conquest. And this, supported by an oath exactly similar to that taken by the Anglo-Saxon kings, and by the assent of the multitude, English as well as Normans, on the day of his coronation, gave as much appearance of a regular succession, as the circumstances of the times would permit. Those who yielded to such circumstances could not foresee, and were unwilling to anticipate, the bitterness of that servitude which William and his Norman followers were to bring upon their country.

His conduct at first moderate

The commencement of his administration was tolerably equitable. Though many confiscations took place, in order to gratify the Norman army, yet the mass of property was left in the hands of its former possessors. Offices of high trust were bestowed upon Englishmen, even upon those whose family renown might have raised the most aspiring thoughts.* But partly through the insolence and injustice of William's Norman vassals, partly through the suspiciousness natural to a man conscious of having overturned the national government, his yoke soon became more heavy. The English were oppressed; they rebelled, were subdued, and oppressed again. All their risings

It becomes more tyrannical.

* Ordericus Vitalis, p. 520. (in Du Chesne, Hist. Norm. Script.)

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were without concert, and desperate: they wanted men fit to head them, and fortresses to sustain their revolt.* After a very few years, they sank in despair, and yielded for a century to the indignities of a comparatively small body of strangers without a single tumult. So possible is it for a nation to be kept in permanent servitude, even without losing its reputation for individual courage, or its desire of freedom!

The tyranny of William displayed less of passion or insolence than of that indifference about human suffering, which distinguishes a cold and far-sighted statesman. Impressed by the frequent risings of the English at the commencement of his reign, and by the recollection, as one historian observes, that the mild government of Canute had only ended in the expulsion of the Danish line,† he formed the scheme of rivetting such fetters upon the conquered nation, that all resistance should become impracticable. Those who had obtained honourable offices were successively deprived of them; even the bishops and abbots of

* Ordericus notices the want of castles in England, as one reason why rebellions were easily quelled. p. 511. Failing in their attempts at a generous resistance, the English endeavoured to get rid of their enemies by assassination, to which many Normans became victims. William therefore enacted, that in every case of *murder*, which strictly meant the killing of any one by an unknown hand, the hundred should be liable in a fine, unless they could prove the person murdered to be an Englishman. This was tried by an inquest, upon what was called a presentment of Englishry. But from the reign of Henry II., the two nations having been very much intermingled, this inquiry, as we learn from the Dialogue de Scaccario, p. 26. ceased, and in every case of a freeman murdered by persons unknown, the hundred was fined. See however Bracton, l. iii. c. 15.

† Malmsbury, p. 104.

English bishops were deposed;* a stretch of power very singular in that age, and which marks how much the great talents of William made him feared by the church, in the moment of her highest pretensions, for Gregory VII. was in the papal chair. Morcar, one of the most illustrious English, suffered perpetual imprisonment. Waltheoff, a man of equally conspicuous birth, lost his head upon a scaffold by a very harsh if not iniquitous sentence. It was so rare in those times to inflict judicially any capital punishment upon persons of such rank, that his death seems to have produced more indignation and despair in England than any single circumstance. The name of Englishman was turned into a reproach. None of that race for a hundred years were raised to any dignity in the state or church.† Their language and the characters in which it was written were rejected as barbarous; in all schools, children were taught French, and the laws were administered in no other tongue.‡ It is well

* Hoveden, p. 453

† Becket is said to have been the first Englishman who reached any considerable dignity. Lord Lyttleton's Hist. of Henry II. vol. ii. p. 22. And Eadmer declares, that Henry I. would not place a single Englishman at the head of a monastery. Si Anglus erat, nulla virtus, ut honore aliquo dignus judicaretur, eum poterat adjuvare. p. 110.

‡ Ingulfus, p. 61. Tantum tunc Anglicos abominati sunt, ut quantocunque merito pollerent, de dignitatibus repellebantur, et multo minus habiles alienigenæ de quâcunque aliâ natione, quæ sub cælo est, extitissent, gratanter assumerentur. Ipsum etiam idioma tantum abhorrebant, quod leges terræ, statutaque Anglicorum regum linguâ Gallicâ tractarentur; et pueris etiam in scholis principia literarum grammatica Gallicè, ac non Anglicè traderentur; modus etiam scribendi Anglicus omitteretur, et modus Gallicus in chartis et in libris omnibus admitteretur.

known, that this use of French in all legal proceedings lasted till the reign of Edward III.

Confiscation of English property.

This exclusion of the English from political privileges was accompanied with such a confiscation of property as never perhaps has proceeded from any government, not avowedly founding its title upon the sword. In twenty years from the accession of William, almost the whole soil of England had been divided among foreigners. Of the native proprietors many had perished in the scenes of rapine and tyranny which attended this convulsion; many were fallen into the utmost poverty; and not a few, certainly, still held their lands as vassals of Norman lords. Several English nobles, desperate of the fortunes of their country, sought refuge in the court of Constantinople, and approved their valour in the wars of Alexius against another Norman conqueror scarcely less celebrated than their own, Robert Guiscard. Under the name of Varangians, those true and faithful supporters of the Byzantine empire preserved to its dissolution their ancient Saxon idiom.*

The extent of this spoliation of property is not to be gathered merely from historians, whose language might be accused of vagueness and amplification. In the great national survey of Domesday Book, we have an indisputable record of this vast

* Gibbon, vol. x. p. 223. No writer, except perhaps the Saxon Chronicler, is so full of William's tyranny as Ordericus Vitalis. See particularly pp. 507. 512. 514. 521. 523. in Du Chesne, Hist. Norm. Script. Ordericus was an Englishman, but passed at ten years old, A.D. 1084, into Normandy, where he became professed in the monastery of Ev. ibid. 924.

territorial revolution during the reign of the Conqueror. I am indeed surprized at Brady's position, that the English had suffered an indiscriminate deprivation of their lands. Undoubtedly there were a few left in almost every county, who still enjoyed the estates which they held under Edward the Confessor, free from any superiority but that of the crown, and were denominated, as in former times, the king's thanes.* Cospatric, son perhaps of one of that name who had possessed the earldom of Northumberland, held forty-one manors in Yorkshire, though many of them are stated in Domesday to be waste. Inferior freeholders were probably much less disturbed in their estates than the higher class. Though few of English birth continued to enjoy entire manors, even by a mesne tenure, it is reasonable to suppose that the greater part of those who appear, under various denominations, to have possessed small freeholds and parcels of manors, were no other than the original natives.

Besides the severities exercised upon the English after every insurrection, two instances of William's unsparing cruelty are well known, the devastation of Yorkshire and of the New Forest.

Devastation of Yorkshire and New Forest.

* Brady, whose unfairness always keeps pace with his ability, pretends that all these were menial officers of the king's household. But notwithstanding the difficulty of disproving these gratuitous suppositions, it is pretty certain, that many of the English proprietors in Domesday could not have been of this description. See p. 99. 153 218. 219. and other places. The question however was not worth a battle, though it makes a figure in the controversy of Normans and Anti-Normans, between Dugdale and Brady on the one side, and Tyrrell, Petyt and Atwood on the other.

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In the former, which had the tyrant's plea necessity for its pretext, an invasion being threatened from Denmark, the whole country between the Tyne and the Humber was laid so desolate, that for nine years afterwards there was not an inhabited village, and hardly an inhabitant left; the wasting of this district having been followed by a famine, which swept away the whole population.* That of the New Forest, though undoubtedly less calamitous in its effects, seems even more monstrous, from the frivolousness of the cause.† He afforested several other tracts. And these favourite demesnes of the Norman kings were protected by a system of iniquitous and cruel regulations, called the Forest Laws, which it became afterwards a great object with the asserters of liberty to correct. The penalty for killing a stag or a boar was loss of eyes: for William loved the great game, says the Saxon Chronicle, as if he had been their father.‡

Proofs of depopulation from Domesday Book

A more general proof of the ruinous oppression of William the Conqueror may be deduced from the comparative condition of the English towns in the reign of Edward the Confessor, and at the compilation of Domesday. At the former epoch there were in York 1607 inhabited houses, at the latter 967; at the former there were in Oxford

* Malmsbury, p. 103. Hoveden, p. 451. Orderic. Vitalis, p. 514. The desolation of Yorkshire continued in Malmsbury's time, sixty or seventy years afterwards; nudum omnium solum usque ad hoc etiam tempus.

† Malmsbury, p. 111.

‡ Chron. Saxon. p. 191.

721, at the latter 243; of 172 houses in Dorchester, 100 were destroyed; of 243 in Derby, 103; of 487 in Chester, 205. Some other towns had suffered less, but scarcely any one fails to exhibit marks of a decayed population. As to the relative numbers of the peasantry and value of lands at these two periods, it would not be easy to assert any thing without a laborious examination of Domesday Book.

Domains of the Crown.

The demesne lands of the crown, extensive and scattered over every county, were abundantly sufficient to support its dignity and magnificence;* and William, far from wasting this revenue by prodigal grants, took care to let them at the highest rate to farm, little caring how much the cultivators were racked by his tenants.† Yet his exactions, both feudal and in the way of tallage from his burgesses and the tenants of his vassals, were almost as violent as his confiscations. No source of income was neglected by him, or indeed by his successors, however trifling, unjust or unreasonable. His revenues, if we could trust Ordericus Vitalis, amounted to £1060 a day. This, in mere weight of silver, would be equal to nearly £1,200,000 a year at present. But the arithmetical statements of these writers are not implicitly to be relied upon. He left at his death a treasure of £60,000 which, in conformity to his dying request, his successor distributed among the church

Riches of the Conqueror.

* They consisted of 1422 manors. Lyttleton's Henry II. vol. ii. p. 288.

† Chron. Saxon. p. 186.

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and poor of the kingdom, as a feeble expiation of the crimes by which it had been accumulated;* an act of disinterestedness, which seems to prove that Rufus, amidst all his vices, was not destitute of better feelings than historians have ascribed to him. It might appear that William had little use for his extorted wealth. By the feudal constitution, as established during his reign, he commanded the service of a vast army at its own expense, either for domestic or continental warfare. But this was not sufficient for his purpose: like other tyrants, he put greater trust in mercenary obedience. Some of his predecessors had kept bodies of Danish troops in pay; partly to be secure against their hostility, partly from the convenience of a regular army, and the love which princes bear to it. But William carried this to a much greater length. He had always stipendiary soldiers at his command. Indeed his army at the conquest could not have been swelled to such numbers by any other means. They were drawn, by the allurement of high pay, not from France and Britany alone, but Flanders, Germany, and even Spain. When Canute of Denmark threatened an invasion in 1085, William, too conscious of his own tyranny to use the arms of his English subjects, collected a mercenary force so vast, that men wondered, says the Saxon Chro-

His mercenary troops.

* Huntingdon, p. 371. Ordericus Vitalis puts a long penitential speech into William's mouth on his death-bed. p. 666. Though this may be his invention, yet facts seem to show the compunctions of the tyrant's conscience.

nicler, how the country could maintain it. This he quartered upon the people, according to the proportion of their estates.

Feudal system established.

Whatever may be thought of the Anglo-Saxon tenures, it is certain, that those of the feudal system were thoroughly established in England under the conqueror. It has been observed, in another part of this work, that the rights, or feudal incidents, of wardship and marriage were nearly peculiar to England and Normandy. They certainly did not exist in the former before the conquest; but whether they were ancient customs of the latter cannot be ascertained, unless we had more incontestable records of its early jurisprudence. For the Great Customary of Normandy is a compilation as late as the reign of Richard Cœur de Lion when the laws of England might have passed into a country so long and intimately connected with it. But there appears reason to think, that the seizure of the lands in wardship, the selling of the heiress in marriage, were originally deemed rather acts of violence than conformable to law. For Henry I.'s charter expressly promises, that the mother, or next of kin shall have the custody of the lands as well as person of the heir.† And as the charter of Henry II. refers to and confirms that of his grandfather, it seems

* Chron. Saxon. p 185. Ingulfus, p. 79.

† Terræ et liberorum custos erit sive uxor, sive alius propinquorum, qui justus esse debebit; et præcipio ut barones mei similiter se contineant ergà filios vel filias vel uxores hominum meorum. Leges Anglo-Saxonicæ, p. 234.

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to follow, that what is called guardianship in chivalry had not yet been established. At least it is not till the assize of Clarendon, confirmed at Northampton in 1176,* that the custody of the heir is clearly reserved to the lord. With respect to the right of consenting to the marriage of a female vassal, it seems to have been, as I have elsewhere observed, pretty general in feudal tenures. But the sale of her person in marriage, or the exaction of a sum of money in lieu of this scandalous tyranny, was only the law of England, and was not perhaps fully authorized as such till the statute of Merton in 1236.

One innovation made by William upon the feudal law is very deserving of attention. By the leading principle of feuds, an oath of fealty was due from the vassal to the lord of whom he immediately held his land, and to no other. The king of France, long after this period, had no feudal and scarcely any royal authority over the tenants of his own vassals. But William received at Salisbury, in 1085, the fealty of all landholders in England, both those who held in chief, and their tenants;† thus breaking in upon the feudal compact in its most essential attribute, the exclusive dependence of a vassal upon his lord. And this may be reckoned among the several causes, which prevented the continental notions of independence upon the crown from ever taking root among the English aristocracy.

* Leges Anglo-Saxonicæ, p. 330. † Chron. Saxon. p. 187.

Preservation of public peace.

The best measure of William was the establishment of public peace. He permitted no rapine but his own. The feuds of private revenge, the lawlessness of robbery, were repressed.* A girl loaded with gold, if we believe some ancient writers, might have passed safely through the kingdom.* But this was the tranquillity of an imperious and vigilant despotism, the degree of which may be measured by these effects, in which no improvement of civilization had any share. There is assuredly nothing to wonder at in the detestation with which the English long regarded the memory of this tyrant.† Some advantages undoubtedly, in the course of human affairs, eventually sprang from the Norman conquest. The invaders, though without perhaps any intrinsic superiority in social virtues over the native English, degraded and barbarous as these are represented to us, had at least that exterior polish of courteous and chivalric manners, and that taste for refinement and magnificence, which serve to elevate a people from mere savage rudeness. Their buildings, sacred as well as domestic, became more substantial and elegant. The learning of the clergy, the only class to whom that word could at all be applicable, became infinitely more

* Chron. Saxon. p. 190 M. Paris, p 10. I will not omit one other circumstance, apparently praiseworthy, which Ordericus mentions of William, that he tried to learn English, in order to render justice by understanding every man's complaint, but failed on account of his advanced age. p. 520. This was in the early part of his reign, before the reluctance of the English to submit had exasperated his disposition.

† W. Malmsb. Præf. ad. l. iii.

respectable in a short time after the conquest. And though this may by some be ascribed to the general improvements of Europe in that point during the twelfth century, yet I think it was partly owing to the more free intercourse with France and the closer dependence upon Rome which that revolution produced. This circumstance was, however, of no great moment to the English of those times, whose happiness could hardly be affected by the theological reputation of Lanfranc and Anselm. Perhaps the chief benefit which the natives of that generation derived from the government of William and his successors, next to that of a more vigilant police, was the security they found from invasion on the side of Denmark and Norway. The high reputation of the Conqueror and his sons, with the regular organization of a feudal militia, deterred those predatory armies, which had brought such repeated calamity on England in former times.

Difference between the feudal policy in England and France.

The system of feudal policy, though derived to England from a French source, bore a very different appearance in the two countries. France, for about two centuries after the house of Capet had usurped the throne of Charlemagne's posterity, could hardly be deemed a regular confederacy, much less an entire monarchy. But in England, a government, feudal indeed in its form, but arbitrary in its exercise, not only maintained subordination, but almost extinguished liberty. Several causes seem to have conspired towards this radical difference. In the first place a king-

dom, comparatively small, is much more easily kept under controul than one of vast extent. And the fiefs of Anglo-Norman barons after the conquest were far less considerable, even relatively to the size of the two countries, than those of France. The earl of Chester held, indeed, almost all that county;* the earl of Shrewsbury nearly the whole of Salop. But these domains bore no comparison with the dukedom of Guienne, or the county of Toulouse. In general, the lordships of William's barons, whether this were owing to policy or accident, were exceedingly dispersed. Robert, earl of Moreton, for example, the most richly endowed of his followers, enjoyed 248 manors in Cornwall, 54 in Sussex, 196 in Yorkshire, 99 in Northamptonshire, besides many in other counties.† Estates so disjoined, however immense in their aggregate, were ill calculated for supporting a rebellion. It is observed by Madox, that the knight's fees of almost every barony were scattered over various counties.

In the next place, these baronial fiefs were held under an actual derivation from the crown. The great vassals of France had usurped their domi-

* This was, upon the whole, more like a great French fief than any English earldom Hugh de Abrincis, nephew of William I., had barons of his own, one of whom held forty six and another thirty manors. Chester was first called a county-palatine under Henry II.; but it previously possessed all regalian rights of jurisdiction. After the forfeitures of the house of Montgomery, it acquired all the country between the Mersey and Ribble Several eminent men inherited the earldom; but upon the death of the most distinguished, Ranulf, in 1232, it fell into a female line, and soon escheated to the crown Dugdale's Baronage, p. 45. Lyttleton's Henry II., vol. ii. p. 218.

† Dugdale's Baronage, p. 25.

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nions before the accession of Hugh Capet, and barely submitted to his nominal sovereignty. They never intended to yield the feudal tributes of relief and aid, nor did some of them even acknowledge the supremacy of his royal jurisdiction. But the conqueror and his successors imposed what conditions they would upon a set of barons who owed all to their grants; and as mankind's notions of right are generally founded upon prescription, these peers grew accustomed to endure many burthens, reluctantly indeed, but without that feeling of injury which would have resisted an attempt to impose them upon the vassals of the French crown. For the same reasons, the barons of England were regularly summoned to the great council, and by their attendance in it, and concurrence in the measures which were there resolved upon, a compactness and unity of interest was given to the monarchy which was entirely wanting in that of France. But above all, the paramount authority of the king's court, and those excellent Saxon tribunals of the county and hundred, kept within very narrow limits that great support of the feudal aristocracy, the right of territorial jurisdiction. Except in the counties palatine, the feudal courts possessed a very trifling degree of jurisdiction over civil, and not a very extensive one over criminal causes.

Hatred of English to Normans.

We may add to the circumstances that rendered the crown powerful during the first century after the conquest, an extreme antipathy of the native English towards their invaders. Both William

Rufus and Henry I. made use of the former to strengthen themselves against the attempts of their brother Robert; though they forgot their promises to the English after attaining their object.* A fact, mentioned by Ordericus Vitalis, illustrates the advantage which the government found in this national animosity. During the siege of Bridgenorth, a town belonging to Robert de Belesme, one of the most turbulent and powerful of the Norman barons, by Henry I. in 1102, the rest of the nobility deliberated together, and came to the conclusion, that if the king could expel so distinguished a subject, he would be able to treat them all as his servants. They endeavoured therefore to bring about a treaty: but the English part of Henry's army, hating Robert de Belesme as a Norman, urged the king to proceed with the siege; which he did, and took the castle.†

Tyranny of the Norman government.

Unrestrained, therefore, comparatively speaking, by the aristocratic principles which influenced other feudal countries, the administration acquired a tone of rigour and arbitrariness under William the Conqueror, which, though sometimes perhaps a little mitigated, did not cease during a century and a half. For the first three reigns we must have recourse to historians; whose language, though vague, and perhaps exaggerated, is too uniform and impressive to leave a doubt of the

* W. Malmsbury, p. 120. et 156. R. Hoveden, p. 461. Chron Saxon. p. 194.

† Du Chesne, Script. Norman p. 807

tyrannical character of the government. The intolerable exactions of tribute, the rapine of purveyance, the iniquity of royal courts, are continually in their mouths. "God sees the wretched people," says the Saxon Chronicler, "most unjustly oppressed; first they are despoiled of their possessions, then butchered. This was a grievous year. (1124.) Whoever had any property, lost it by heavy taxes and unjust decrees."* The same ancient chronicle, which appears to have been continued from time to time in the abbey of Peterborough, frequently utters similar notes of lamentation.

Its exactions.

From the reign of Stephen, the miseries of which are not to my immediate purpose, so far as they proceeded from anarchy and intestine war,† we are able to trace the character of government by existing records.‡ These, digested

* Chron Saxon. p 228 Non facile potest narrari miseria, says Roger de Hoveden, quam sustinuit illo tempore [circ. ann 1103] terra Anglorum propter regias exactiones p 470.

† The following simple picture of that reign from the Saxon Chronicle may be worth inserting "The nobles and bishops built castles, and filled them with devilish and wicked men, and oppressed the people, cruelly torturing men for their money They imposed taxes upon towns, and when they had exhausted them of every thing, set them on fire. You might travel a day, and not find one man living in a town, nor any land in cultivation. Never did the country suffer greater evils. If two or three men were seen riding up to a town, all its inhabitants left it, taking them for plunderers And this lasted, growing worse and worse, throughout Stephen's reign. Men said openly, that Christ and his saints were asleep" p. 239

‡ The earliest record in the Pipe-office is that which Madox, in conformity to the usage of others, cites by the name of Magnum Rotulum quinto Stephani But, in a particular dissertation subjoined to his History of the Exchequer, he inclines, though not decisively, to refer this record to the reign of Henry I.

by the industrious Madox into his History of the Exchequer, give us far more insight into the spirit of the constitution, if we may use such a word, than all our monkish chronicles. It was not a sanguinary despotism. Henry II. was a prince of remarkable clemency; and none of the Conqueror's successors were as grossly tyrannical as himself. But the system of rapacious extortion from their subjects prevailed to a degree which we should rather expect to find among eastern slaves, than that high-spirited race of Normandy, whose renown then filled Europe and Asia. The right of wardship was abused by selling the heir and his land to the highest bidder. That of marriage was carried to a still grosser excess. The kings of France indeed claimed the prerogative of forbidding the marriage of their vassals' daughters to such persons as they thought unfriendly or dangerous to themselves; but I am not aware that they ever compelled them to marry, much less that they turned this attribute of sovereignty into a means of revenue. But in England, women, and even men, simply as tenants in chief, and not as wards, fined to the crown for leave to marry whom they would, or not to be compelled to marry any other.* Towns not only fined for original grants of franchises, but for repeated confirmations. The Jews paid exorbitant sums for every common right of mankind, for protection, for justice. In return, they

* Madox, c. 10

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were sustained against their Christian debtors in demands of usury, which superstition and tyranny rendered enormous.* Men fined for the king's good-will; or that he would remit his anger; or to have his mediation with their adversaries. Many fines seem as if were imposed in sport, if we look to the cause; though their extent, and the solemnity with which they were recorded, prove the humour to have been differently relished by the two parties. Thus the bishop of Winchester paid a ton of good wine for not reminding the king (John) to give a girdle to the countess of Albemarle; and Robert de Vaux five best palfreys, that the same king might hold his peace about Henry Pinel's wife. Another paid four marks for leave to eat (pro licentiâ comedendi). But of all the abuses which deformed the Anglo-Norman government, none was so flagitious as the sale of judicial redress. The king, we are often told, is the fountain of justice; but in those ages, it was one which gold alone could unseal. Men fined to have right done them; to sue in a certain court; to implead a certain person; to have restitution of land which they had recovered at law.† From the sale of that justice which every citizen has a right to demand, it was an easy transition to withhold or deny it. Fines were received for the king's help against the adverse suitor; that is, for perversion of justice, or for delay. Sometimes they were

* Madox, c. 7 † Id. c. 12 and 13

paid by opposite parties, and, of course, for opposite ends. These were called counter-fines; but the money was, sometimes, or as Lord Lyttleton thinks, invariably, returned to the unsuccessful suitor.*

General taxes.

Among a people imperfectly civilized, the most outrageous injustice towards individuals may pass without the slightest notice, while in matters affecting the community, the powers of government are exceedingly controuled. It becomes therefore an important question, what prerogative these Norman kings were used to exercise in raising money, and in general legislation. By the prevailing feudal customs, the lord was entitled to demand a pecuniary aid of his vassals in certain cases. These were, in England, to make his eldest son a knight, to marry his eldest daughter, and to ransom himself from captivity. Accordingly, when such circumstances occurred, aids were levied by the crown upon its tenants, at the rate of a mark or a pound for every knight's fee.† These aids, being strictly due in the prescribed cases, were taken without requiring the consent of parliament. Escuage, which was a commutation for the personal service of military tenants

* The most opposite instances of these exactions are well selected from Madox by Hume, Appendix II: upon which account I have gone less into detail than would otherwise have been necessary.

† The *reasonable aid* was fixed by the statute of Westminster I., 3 Edw I c. 36, at twenty shillings for every knight's fee, and as much for every 20*l* value of land held by socage. The aid pour faire fitz chevalier might be raised, when he entered into his fifteenth year, pour fille marier, when she reached the age of seven.

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in war, having rather the appearance of an indulgence than an imposition, might reasonably be levied by the king.* It was not till the charter of John that escuage became a parliamentary assessment; the custom of commuting service having then grown general, and the rate of commutation being variable.

None but military tenants could be liable for escuage;† but the inferior subjects of the crown were oppressed by tallages. The demesne lands of the king and all royal towns were liable to tallage; an imposition far more rigorous and irregular than those which fell upon the gentry. Tallages were continually raised upon different towns during all the Norman reigns, without the consent of parliament, which neither represented them nor cared for their interests. The itinerant justices in their circuit usually set this tax. Sometimes the tallage was assessed in gross upon a town, and collected by the burgesses: sometimes individually at the judgement of the justices. There was an appeal from an excessive assessment to the barons of the exchequer. Inferior lords might tallage their own tenants and demesne

* Fit interdum, ut imminente vel insurgente in regnum hostium machinatione, decernat rex de singulis feodis militum summam aliquam solvi, marcam scilicet, vel libram unam; unde militibus stipendia vel donativa succedant. Mavult enim princeps stipendiarios quàm domesticos bellicis exponere casibus. Hæc itaque summa, quia nomine scutorum solvitur, scutagium nominatur. Dialogus de Scaccario, ad finem. Madox, Hist. Exchequer, p. 25. (edit. in folio)

† The tenant in capite was entitled to be re-imbursed what would have been his escuage by his vassals even if he performed personal service. Madox, c. 16.

towns, though not, it seems, without the king's permission.* Customs upon the import and export of merchandize, of which the prisage of wine, that is, a right of taking two casks out of each vessel, seems the most material, were immemorially exacted by the crown. There is no appearance that these originated with parliament.† Another tax, extending to all the lands of the kingdom, was Danegeld, the ship-money of those times. This name had been originally given to the tax imposed under Ethelred II., in order to raise a tribute exacted by the Danes. It was afterwards applied to a permanent contribution for the public defence against the same enemies. But after the conquest this tax is said to have been only occasionally required; and the latest instance on record of its payment is in the 20th of Henry II. Its imposition appears to have been at the king's discretion.‡

Right of legislation

The right of general legislation was undoubtedly placed in the king, conjointly with his great council,§ or, if the expression be thought more proper, with their advice. So little opposition was found in these assemblies by the early Norman kings, that they gratified their own love of pomp, as well as the pride of their barons, by

* For the important subject of tallages, see Madox, c. 17

† Madox, c. 18. Hale's Treatise on the Customs in Hargrave's Tracts, vol. i. p. 116.

‡ Henr. Huntingdon. l. 7. p. 205 Dialogus de Scaccario, c. 11. Madox, c. 17 Lyttleton's Henry II. vol. ii. p. 170.

§ Glanvil, Prologus ad Tractatum de Consuetud.

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consulting them in every important business. But the limits of legislative power were extremely indefinite. New laws, like new taxes, affecting the community, required the sanction of that assembly which was supposed to represent it; but there was no security for individuals against acts of prerogative, which we should justly consider as most tyrannical. Henry II., the best of these monarchs, banished from England the relations and friends of Becket, to the number of four hundred. At another time, he sent over from Normandy an injunction, that all the kindred of those who obeyed a papal interdict should be banished, and their estates confiscated.*

Laws and charters of Norman kings.

The statutes of those reigns do not exhibit to us many provisions calculated to maintain public liberty on a broad and general foundation. And although the laws then enacted have not all been preserved, yet it is unlikely that any of an extensively remedial nature should have left no trace of their existence. We find, however, what has sometimes been called the Magna Charta of

* Hoveden, p. 496 Lyttleton, vol. ii. p. 530 The latter says that this edict must have been framed by the king with the advice and assent of his council But if he means his great council, I cannot suppose that all the barons and tenants in capite could have been duly summoned to a council held beyond seas. Some English barons might doubtless have been with the king, as at Verneuil in 1176, where a mixed assembly of English and French enacted laws for both countries. Benedict. Abbas apud Hume. So at Northampton in 1165, several Norman barons voted, nor is any notice taken of this as irregular. Fitz Stephen, ibid. So unfixed, or rather unformed, were all constitutional principles.

William the Conqueror, preserved in Roger de Hoveden's collection of his laws. We will, enjoin, and grant, says the king, that all freemen of our kingdom shall enjoy their lands in peace, free from all tallage, and from every unjust exaction, so that nothing but their service lawfully due to us shall be demanded at their hands.* The laws of the Conqueror, found in Hoveden, are wholly different from those in Ingulfus, and are suspected not to have escaped considerable interpolation.† It is remarkable, that no reference is made to this concession of William the Conqueror in any subsequent charter. However it seems to comprehend only the feudal tenants of the crown. Nor does the charter of Henry I., though so much celebrated, contain any thing specially expressed but a remission of unreasonable reliefs, wardships, and other feudal burthens.‡ It proceeds however to declare that he gives his subjects the laws of Edward the Confessor, with the emendations made by his father with consent of his barons.§

* Volumus etiam, ac firmiter præcipimus et concedimus, ut omnes liberi homines totius monarchiæ prædicti regni nostri habeant et teneant terras suas et possessiones suas benè, et in pace, liberè ab omni exactione injustâ, et ab omni tallagio, ita quod nihil ab iis exigatur vel capiatur, nisi servitium suum liberum, quod de jure nobis facere debent, et facere tenentur; et prout statutum est iis, et illis a nobis datum et concessum jure hæreditario in perpetuum per commune concilium totius regni nostri prædicti.

† Selden, ad Eadmerum Hody (Treatise on Convocations, p 249) infers from the words of Hoveden, that they were altered from the French original by Glanvil.

‡ Wilkins, p 234

§ A great impression is said to have been made on the barons confederated against John, by the production of Henry I.'s charter, whereof they had been ignorant Matt Paris. p. 212 But this could hardly have been the existing charter, for reasons alledged by Blackstone Introduction to Magna Charta, p 6

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The charter of Stephen not only confirms that of his predecessor, but adds, in fuller terms than Henry had used, an express concession of the laws and customs of Edward.* Henry II. is silent about these, although he repeats the confirmation of his grandfather's charter.† The people however had begun to look back to a more ancient standard of law. The Norman conquest, and all that ensued upon it, had endeared the memory of their Saxon government. Its disorders were forgotten, or, rather, were less odious to a rude nation, than the coercive justice by which they were afterwards restrained.‡ Hence it became the favourite cry to demand the laws of Edward the Confessor; and the Normans themselves, as they grew dissatisfied with the royal administration, fell into these English sentiments.§ But what these laws were, or more properly perhaps, these customs subsisting in the Confessor's age, was not very distinctly understood.‖ So far, however, was clear, that the

* Wilkins, Leges Anglo-Saxon. p. 310.

† Id. p. 318.

‡ The Saxon Chronicler complains of a wittenagemot, as he calls it, or assizes, held at Leicester in 1124, where forty-four thieves were hanged, a greater number than was ever before known; it was said that many suffered unjustly p. 228.

§ The distinction between the two nations was pretty well obliterated at the end of Henry II.'s reign, as we learn from the Dialogue on the Exchequer, then written; jam cohabitantibus Anglicis et Normannis, et alterutrûm uxores ducentibus vel nubentibus, sic permixtæ sunt nationes, ut vix discerni possit hodie, de liberis loquor, quis Anglicus, quis Normannus sit genere; exceptis duntaxat ascriptitiis qui villani dicuntur, quibus non est liberum obstantibus dominis suis a sui status conditione discedere. Espropter pene quicunque sic hodie occisus reperitur, ut murdrum punitur, exceptis his quibus certa sunt ut diximus servilis conditionis indicia. p. 36.

‖ Non quas tulit, sed quas ob-

rigorous feudal servitudes, the weighty tributes upon poorer freemen, had never prevailed before the conquest. In claiming the laws of Edward the Confessor, our ancestors meant but the redress of grievances which tradition told them had not always existed.

Richard I.'s chancellor deposed by the barons.

It is highly probable, independently of the evidence supplied by the charters of Henry I. and his two successors, that a sense of oppression had long been stimulating the subjects of so arbitrary a government, before they gave any demonstrations of it sufficiently palpable to find a place in history. But there are certainly no instances of rebellion, or even, as far as we know, of a constitutional resistance in parliament, down to the reign of Richard I. The revolt of the earls of Leicester and Norfolk against Henry II. which endangered his throne and comprehended his children with a large part of his barons, appears not to have been founded even upon the pretext of public grievances. Under Richard I., something more of a national spirit began to show itself. For the king having left his chancellor William Longchamp joint regent and justiciary with the bishop of Durham during his crusade, the foolish insolence of the former,

servavent, says William of Malmsbury, concerning the Confessor's laws. Those bearing his name in Lambard and Wilkins are evidently spurious, though it may not be easy to fix upon the time when they were forged. Those found in Ingulphus, in the French language, are genuine, and were confirmed by William the Conqueror. Neither of these collections, however, can be thought to have any relation to the civil liberty of the subject. It has been deemed more rational to suppose, that these longings for Edward's laws were rather meant for a mild administration of government, free from unjust Norman innovations, than any written and definitive system.

who excluded his co-adjutor from any share in the administration, provoked every one of the nobility. A convention of these, the king's brother placing himself at their head, passed a sentence of removal and banishment upon the chancellor. Though there might be reason to conceive that this would not be unpleasing to the king, who was already apprized how much Longchamp had abused his trust, it was a remarkable assumption of power by that assembly, and the earliest authority for a leading principle of our constitution, the responsibility of ministers to parliament.

Magna Charta.

In the succeeding reign of John, all the rapacious exactions usual to these Norman kings were not only redoubled, but mingled with other outrages of tyranny still more intolerable.* These too were to be endured at the hands of a prince utterly contemptible for his folly and cowardice. One is surprized at the forbearance displayed by the barons, till they took arms at length in that confederacy, which ended in establishing the Great Charter of Liberties. As this was the first effort towards a legal government, so is it beyond comparison the most important event in our history, except that Revolution without which its benefits would rapidly have been annihilated. The constitution of England has indeed no single date

* In 1207, John took a seventh of the moveables of lay and spiritual persons, cunctis murmurantibus, sed contradicere non audentibus. Matt. Paris, p. 186, ed. 1684. But his insults upon the nobility in debauching their wives and daughters were, as usually happens, the most exasperating provocation.

from which its duration is to be reckoned. The institutions of positive law, the far more important changes which time has wrought in the order of society, during six hundred years subsequent to the Great Charter, have undoubtedly lessened its direct application to our present circumstances. But it is still the key-stone of English liberty. All that has since been obtained is little more than as confirmation or commentary; and if every subsequent law were to be swept away, there would still remain the bold features that distinguish a free from a despotic monarchy. It has been lately the fashion to depreciate the value of Magna Charta, as if it had sprung from the private ambition of a few selfish barons, and redressed only some feudal abuses. It is indeed of little importance by what motives those who obtained it were guided. The real characters of men most distinguished in the transactions of that time are not easily determined at present. Yet if we bring these ungrateful suspicions to the test, they prove destitute of all reasonable foundation. An equal distribution of civil rights to all classes of freemen forms the peculiar beauty of the charter. In this just solicitude for the people, and in the moderation which infringed upon no essential prerogative of the monarchy, we may perceive a liberality and patriotism very unlike the selfishness which is sometimes rashly imputed to those ancient barons. And, as far as we are guided by historical testimony, two great men, the pillars of our church and state, may be considered as entitled beyond

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the rest to the glory of this monument; Stephen Langton, archbishop of Canterbury, and William, earl of Pembroke. To their temperate zeal for a legal government, England was indebted during that critical period for the two greatest blessings that patriotic statesmen could confer; the establishment of civil liberty upon an immoveable basis, and the preservation of national independence under the ancient line of sovereigns, which rasher men were about to exchange for the dominion of France.

By the Magna Charta of John, reliefs were limited to a certain sum, according to the rank of the tenant, the waste committed by guardians in chivalry restrained, the disparagement in matrimony of female wards forbidden, and widows secured from compulsory marriage. These regulations, extending to the sub-vassals of the crown, redressed the worst grievances of every military tenant in England. The franchises of the city of London and of all towns and boroughs were declared inviolable. The freedom of commerce was guaranteed to alien merchants. The court of Common Pleas, instead of following the king's person, was fixed at Westminster. The tyranny exercised in the neighbourhood of royal forests met with some check, which was further enforced by the Charter of Forests under Henry III.

But the essential clauses of Magna Charta are those which protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation. "No

freeman (says the 29th chapter of Henry III.'s charter, which, as the existing law, I quote in preference to that of John, the variations not being very material) shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we pass upon him, nor send upon him, but by lawful judgment of his peers, or by the law of the land.* We will sell to no man, we will not deny, or delay to any man justice or right." It is obvious, that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the æra, therefore, of King John's charter, it must have been a clear principle of our constitution, that no man can be detained in prison without trial. Whether courts of justice framed the writ of Habeas Corpus in conformity to the spirit of this clause, or found it already in their register, it became from that æra the right of

* Nisi per legale judicium parium suorum, *vel* per legem terræ. Several explanations have been offered of the alternative clause; which some have referred to judgement by default or demurrer, others to the process of attachment for contempt. Certainly there are many legal procedures besides trial by jury, through which a party's goods or person may be taken. But one may doubt, whether these were in contemplation of the framers of Magna Charta. In an entry of the charter of 1217 by a contemporary hand, preserved in a book in the town-clerk's office in London, called Liber Custumarum et Regum antiquorum, a various reading, *et* per legem terræ, occurs. Blackstone's Charters, p. 42. And the word *vel* is so frequently used for *et*, that I am not wholly free from a suspicion, that it was so intended in this place. The meaning will be, that no person shall be disseised, &c. except upon a lawful cause of action or indictment, found by the verdict of a jury. This really seems as good as any of the disjunctive interpretations; but I do not offer it with much confidence.

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every subject to demand it. That writ, rendered more actively remedial by the statute of Charles II., but founded upon the broad basis of Magna Charta, is the principal bulwark of English liberty; and if ever temporary circumstances, or the doubtful plea of political necessity, shall lead men to look on its denial with apathy, the most distinguishing characteristic of our constitution will be effaced.

As the clause recited above protects the subject from any absolute spoliation of his freehold rights, so others restrain the excessive amercements which had an almost equally ruinous operation. The magnitude of his offence, by the 14th clause of Henry III.'s charter, must be the measure of his fine; and in every case the *contenement* (a word expressive of chattels necessary to each man's station, as the arms of a gentleman, the merchandize of a trader, the plough and waggons of a peasant) was exempted from seizure. A provision was made in the charter of John, that no aid or escuage should be imposed, except in the three feudal cases of aid, without consent of parliament. And this was extended to aids paid by the city of London. But the clause was omitted in the three charters granted by Henry III.; though parliament seem to have acted upon it in most part of his reign. It had however no reference to tallages imposed upon towns without their consent. Fourscore years were yet to elapse before the great principle of parliamentary taxation was explicitly and absolutely recognized.

A law which enacts that justice shall neither be sold, denied nor delayed, stamps with infamy that government under which it had become necessary. But from the time of the charter, according to Madox, the disgraceful perversions of right, which are upon record in the rolls of the exchequer, became less frequent.*

State of the constitution under Henry III.

From this æra a new soul was infused into the people of England. Her liberties, at the best long in abeyance, became a tangible possession, and those indefinite aspirations for the laws of Edward the Confessor were changed into a steady regard for the Great Charter. Pass but from the history of Roger de Hoveden to that of Matthew Paris, from the second Henry to the third, and judge whether the victorious struggle had not excited an energy of public spirit to which the nation was before a stranger. The strong man, in the sublime language of Milton, was aroused from sleep, and shook his invincible locks. Tyranny indeed and injustice will by all historians, not absolutely servile, be noted with moral reprobation; but never shall we find in the English writers of the twelfth century that assertion of positive and national rights which distinguishes those of the next age, and particularly the monk of St Alban's. From his prolix history we may collect three material propositions as to the state of the English constitution during the long reign of Henry III.; a prince to whom the epithet of worthless seems

* Hist of Exchequer, c. 12

best applicable; and who, without committing any flagrant crimes, was at once insincere, ill-judging and pusillanimous. The intervention of such a reign was a very fortunate circumstance for public liberty; which might possibly have been crushed in its infancy, if an Edward had immediately succeeded to the throne of John.

1. The Great Charter was always considered as a fundamental law. But yet it was supposed to acquire additional security by frequent confirmation. This it received, with some not inconsiderable variation, in the first, second, and ninth years of Henry's reign. The last of these is in our present statute-book, and has never received any alterations; but Sir E. Coke reckons thirty-two instances wherein it has been solemnly ratified. Several of these were during the reign of Henry III. and were invariably purchased by the grant of a subsidy.* This prudent accommodation of parliament to the circumstances of their age not only made the law itself appear more inviolable, but established that correspondence between supply and redress, which for some centuries was the balance-spring of our constitution. The charter indeed was often grossly violated by their administration. Even Hubert de Burgh, of whom history speaks more favourably than of Henry's later favourites, though a faithful servant of the crown, seems, as is too often the case with such men, to have thought the king's honour and interest con-

* Matt. Paris, p 272

cerned in maintaining an unlimited prerogative.* The government was however much worse administered after his fall. From the great difficulty of compelling the king to observe the boundaries of law, the English clergy, to whom we are much indebted for their zeal in behalf of liberty during this reign, devised means of binding his conscience, and terrifying his imagination by religious sanctions. The solemn excommunication, accompanied with the most awful threats, pronounced against the violators of Magna Charta, is well known from our common histories. The king was a party to this ceremony, and swore to observe the charter. But Henry III., though a very devout person, had his own notions as to the validity of an oath that affected his power, and indeed passed his life in a series of perjuries. According to the creed of that age, a papal dispensation might annul any prior engagement; and he was generally on sufficiently good terms with Rome to obtain such an indulgence.

2. Though the prohibition of levying aids or escuages without consent of parliament had been omitted in all Henry's charters, an omission for which we cannot assign any other motive than the disposition of his ministers to get rid of that restriction, yet neither one nor the other seem in fact to have been exacted at discretion throughout his reign. On the contrary, the barons frequently refused the aids, or rather subsidies, which his

* M. Paris, p. 284

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prodigality was always demanding. Indeed it would probably have been impossible for the king, however frugal, stripped as he was of so many lucrative though oppressive prerogatives by the Great Charter, to support the expenditure of government from his own resources. Tallages on his demesnes, and especially on the rich and ill-affected city of London, he imposed without scruple; but it does not appear that he ever pretended to a right of general taxation. We may therefore take it for granted, that the clause in John's charter, though not expressly renewed, was still considered as of binding force. The king was often put to great inconvenience by the refusal of supply; and at one time was reduced to sell his plate and jewels, which the citizens of London buying, he was provoked to exclaim with envious spite against their riches, which he had not been able to exhaust.*

3. The power of granting money must of course imply the power of withholding it; yet this has sometimes been little more than a nominal privilege. But in this reign the English parliament exercised their right of refusal, or, what was much better, of conditional assent. Great discontent was expressed at the demand of a subsidy in 1237; and the king alledging that he had expended a great deal of money on his sister's marriage with the emperor, and also upon his own, the barons answered, that he had not taken their

* M. Paris, p. 650.

advice in those affairs, nor ought they to share the punishment of acts of imprudence they had not committed.* In 1241, a subsidy having been demanded for the war in Poitou, the barons drew up a remonstrance, enumerating all the grants they had made on former occasions, but always on condition that the imposition should not be turned into precedent. Their last subsidy, it appears, had been paid into the hands of four barons, who were to expend it at their discretion for the benefit of the king and kingdom;† an early instance of parliamentary controul over public expenditure. On a similar demand in 1244, the king was answered by complaints against the violation of the charter, the waste of former subsidies, and the mal-administration of his servants.‡ Finally, the barons positively refused any money; and he extorted 1500 marks from the city of London. Some years afterwards, they declared their readiness to burthen themselves more than ever, if they could secure the observance of the charter; and requested that the Justiciary, Chancellor, and Treasurer might be appointed with consent of parliament, according, as they asserted, to ancient custom, and might hold their offices during good behaviour.§

* Quod hæc omnia sine consilio fidelium suorum facerat, nec debuerant esse pœnæ participes, qui fuerant a culpâ immunes p 367

† Id. p. 515.

‡ Id p. 563 572 Matthew Paris's language is particularly uncourtly: rex cum instantissimè, ne dicam impudentissimè, auxilium pecuniare ab iis iterum postularet, toties læsi et illusi, contradixerunt ei unanimiter et uno ore in facie

§ De communi consilio regni, sicut ab antiquo consuetum et justum p 778. This was not so great an encroachment as it may

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Forty years of mutual dissatisfaction had elapsed, when a signal act of Henry's improvidence brought on a crisis which endangered his throne. Innocent IV., out of mere animosity against the family of Frederic II., left no means untried to raise up a competitor for the crown of Naples, which Manfred had occupied. Richard earl of Cornwall having been prudent enough to decline this speculation, the pope offered to support Henry's second son, Prince Edmund. Tempted by such a prospect, the silly king involved himself in irretrievable embarrassments by prosecuting an enterprize which could not possibly be advantageous to England, and upon which he entered without the advice of his parliament. Destitute himself of money, he was compelled to throw the expense of this new crusade upon the pope; but the assistance of Rome was never gratuitous, and Henry actually pledged his kingdom for the money which she might expend in a war for her advantage and his own.* He did not even want the effrontery

appear Ralph de Neville, bishop of Chichester, had been made Chancellor in 1224, assensu totius regni; itaque scilicet ut non deponeretur ab ejus sigilli custodia nisi totius regni ordinante consensu et consilio p 266 Accordingly, the king demanding the great seal from him in 1236, he refused to give it up, alledging that having received it in the general council of the kingdom, he could not resign it without the same authority. p 363 And the parliament of 1248 complained that the king had not followed the steps of his predecessors in appointing these three great officers by their consent p 646. What had been in fact the practice of former kings, I do not know; but it is not likely to have been such as they represent Henry, however, had named the archbishop of York to the regency of the kingdom during his absence beyond sea in 1242, de consilio omnium comitum et baronum nostrorum et omnium fidelium nostrorum.—Rymer, t. 1. p. 400.

* p. 771.

to tell parliament in 1257, introducing his son Edmund as king of Sicily, that they were bound for the repayment of 14,000 marks with interest. The pope had also, in furtherance of the Neapolitan project, conferred upon Henry the tithes of all benefices in England, as well as the first fruits of such as should be vacant.* Such a concession drew upon the king the implacable resentment of his clergy, already complaining of the cowardice or connivance that had during all his reign exposed them to the shameless exactions of Rome. Henry had now indeed cause to regret his precipitancy. Alexander IV., the reigning pontiff, threatened him not only with a revocation of the grant to his son, but with an excommunication and general interdict, if the money advanced on his account should not be immediately repaid,† and a Roman agent explained the demand to a parliament assembled at London. The sum required was so enormous, we are told, that it struck all the hearers with astonishment and horror. The nobility of the realm were indignant to think that one man's supine folly should thus bring them to ruin.‡ Who can deny that measures beyond the ordinary course of the constitution were necessary

* p 813

† Rymer, t 1 p 632 This inauspicious negociation for Sicily, which is not altogether unlike that of James I about the Spanish match, in its folly, bad success, and the dissatisfaction it occasioned at home, receives a good deal of illustration from documents in Rymer's collection

‡ Quantitas pecuniæ ad tantam ascendit summam, ut stuporem simul et horrorem in auribus generaret audientium Doluit igitur nobilitas regni, se unius hominis ita confundi supinâ simplicitate. M Paris, p 827.

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to controul so prodigal and injudicious a sovereign? Accordingly, the barons insisted, that twenty-four persons should be nominated, half by the king, and half by themselves, to reform the state of the kingdom. These were appointed on the meeting of the parliament at Oxford, after a prorogation.

The seven years that followed are a revolutionary period, the events of which we do not find satisfactorily explained by the historians of the time.* A king, divested of prerogatives by his people, soon appears even to themselves an injured party. And, as the baronial oligarchy acted with that arbitrary temper which is never pardoned in a government that has an air of usurpation about it, the royalists began to gain ground, chiefly through the defection of some who had joined in the original limitations imposed on the crown, usually called the provisions of Oxford. An ambitious man, confident in his talents and popularity, ventured to display too marked a superiority above his fellows in the same cause. But neither his character, nor the battles of Lewes and Evesham fall strictly within the limits of a constitutional history. It is however important to observe, that, even in the moment of success, Henry III. did not presume to revoke any part of the Great Charter. His victory had been achieved by the arms of the English nobility, who had,

* The best account of the provisions of Oxford in 1260 and the circumstances connected with them is found in the Burton Annals 2 Gale. xv. Scriptores. p. 407. Many of these provisions were afterwards enacted in the statute of Marlebridge.

generally speaking, concurred in the former measures against his government, and whose opposition to the earl of Leicester's usurpation was compatible with a steady attachment to constitutional liberty.

Limitations of the prerogative proved from Bracton

The opinions of eminent lawyers are undoubtedly, where legislative or judicial authorities fail, the best evidence that can be adduced in constitutional history. It will therefore be satisfactory to select a few passages from Bracton, himself a judge at the end of Henry III's reign, by which the limitations of prerogative by law will clearly appear to have been fully established. "The king," says he, "must not be subject to any man, but to God and the law; for the law makes him king. Let the king therefore give to the law what the law gives to him, dominion and power; for there is no king where will and not law bears rule."† "The king (in another place) can do nothing on earth, being the minister of God, but what he can do by law; nor is what is said (in the Pandects) any objection, that whatever the prince pleases shall be law; because by the words that follow in that text it appears to design not any mere will of the prince, but that which is established by the advice of his counsellors, the king giving his authority, and deliberation being had

* The earl of Glocester, whose personal quarrel with Montfort had overthrown the baronial oligarchy, wrote to the king in 1267, ut provisiones Oxoniæ teneri faciat per regnum suum, et ut promissa sibi apud Evesham de facto compleret Matt. Paris, p 850.

† l. 1 c 8

upon it."* This passage is undoubtedly a misrepresentation of the famous lex regia, which has ever been interpreted to convey the unlimited power of the people to their emperors.† But the very circumstance of so perverted a gloss put upon this text is a proof that no other doctrine could be admitted in the law of England. In another passage, Bracton reckons as superior to the king, "not only God and the law, by which he is made king, but his court of earls and barons; for the former (comites) are so styled as associates of the king, and whoever has an associate, has a master;‡ so that if the king were without a bridle, that is, the law, they ought to put a bridle upon him."§ Several other passages in Bracton might be produced to the same import; but these are sufficient to demonstrate the important fact, that however extensive or even indefinite might be the royal prerogative in the days of Henry III., the law was already its superior, itself but made part of the law, and was incompetent to overthrow it. It is true, that in this very reign the practice of dispensing with statutes by a non-obstante was introduced, in imitation of the papal dispensations.‖ But this prerogative could only be exerted within certain limits, and however pernicious it may be justly thought, was, when thus understood and

* l. iii. c. 9. These words are nearly copied from Glanvil's introduction to his treatise.

† See Selden ad Fletam, p. 1046.

‡ This means, I suppose, that he who acts with the consent of others must be in some degree restrained by them; but it is ill expressed.

§ l. ii. c. 16.

‖ M. Paris, p. 701.

defined, not, strictly speaking, incompatible with the legislative sovereignty of parliament.

The King's Court.

In conformity with the system of France and other feudal countries, there was one standing council, which assisted the kings of England in the collection and management of their revenue, the administration of justice to suitors; and the dispatch of all public business. This was styled the King's Court, and held in his palace, or wherever he was personally present. It was composed of the great officers; the chief justiciary;* the chancellor, the constable, marshal, chamberlain, steward, and treasurer, with any others whom the king might appoint. Of this great court there was,

* The Chief Justiciary was the greatest subject in England Besides presiding in the king's court, and in the Exchequer, he was originally, by virtue of his office, the regent of the kingdom during the absence of the sovereign, which, till the loss of Normandy, occurred very frequently Writs, at such times, ran in his name, and were teste'd by him Madox, Hist of Excheq. p 16. His appointment upon these temporary occasions, was expressed, ad custodiendum loco nostro terram nostram Angliæ et pacem regni nostri, and all persons were enjoined to obey him tanquam justitiario nostro. Rymer, t 1 p 181 Sometimes, however, the king issued his own writ de ultra mare The first time when the dignity of this office was impaired was at the death of John, when the justiciary, Hubert de Burgh, being besieged in Dover Castle, those who proclaimed Henry III at Glocester, constituted the earl of Pembroke governor of the king and kingdom, Hubert still retaining his office This is erroneously stated by Matthew Paris, who has misled Spelman in his Glossary, but the truth appears from Hubert's answer to the articles of charge against him, and from a record in Madox's Hist of Exch c 21. note A, wherein the earl of Pembroke is named rector regis et regni, and Hubert de Burgh justiciary In 1241, the archbishop of York was appointed to the regency during Henry's absence in Poitou, without the title of justiciary Rymer, t 1 p 410. Still the office was so considerable, that the barons who met in the Oxford parliament of 1258 insisted, that the justiciary should be annually chosen with their approbation. But the subsequent successes of Henry prevented this being established, and Edward I. discontinued the office altogether

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as it seems, from the beginning, a particular branch, in which all matters relating to the revenue were exclusively transacted. This, though composed of the same persons, yet being held in a different part of the palace, and for different business, was distinguished from the king's court by the name of the exchequer; a separation which became complete, when civil pleas were decided and judgements recorded in this second court.*

The court of exchequer

It is probable, that in the age next after the conquest, few causes, in which the crown had no interest, were carried before the royal tribunals; every man finding a readier course of justice in the manor or county to which he belonged.† But, by degrees, this supreme jurisdiction became more familiar; and as it seemed less liable to partiality or intimidation than the provincial courts, suitors grew willing to submit to its expensiveness and inconvenience. It was obviously the interest of the king's court to give such equity and steadiness to its decisions as might encourage this disposition. Nothing could be more advantageous to the king's authority, nor, what perhaps was more immediately regarded, to his revenue; since a fine was always paid for leave to plead in his court, or to remove thither a cause commenced

* For every thing that can be known about the Curia Regis, and especially this branch of it, the student of our constitutional history should have recourse to Madox's History of the Exchequer, and to the Dialogue de Scaccario, written in the time of Henry II by Richard bishop of Ely, though commonly ascribed to Gervase of Tilbury This treatise he will find subjoined to Madox's work

† Omnis causa terminetur comitatu, vel hundredo, vel halimoto socam habentium Leges Henr. I. c 9

below. But because few, comparatively speaking, could have recourse to so distant a tribunal as that of the king's court, and perhaps also on account of the attachment which the English felt to their ancient right of trial by the neighbouring freeholders, Henry II. established itinerant justices, to decide civil and criminal pleas within each county.* This excellent institution is referred by some to the twenty-second year of that prince; but Madox traces it several years higher.† We have owed to it the uniformity of our common law, which would otherwise have been split, like that of France, into a multitude of local customs; and we still owe to it the assurance, which is felt by the poorest and most remote inhabitant of England, that his right is weighed by the same incorrupt and acute understanding, upon which the decision of the highest questions is reposed. The justices of assize seem originally to have gone their circuits annually, and as part of their duty was to set tallages upon royal towns, and superintend the collection of the revenue, we may be certain that there could be no long interval. This annual visitation was expressly confirmed by the twelfth section of Magna Charta, which provides also, that no assize of novel disseisin, or mort d'ancestor, should be taken except in the shire where the lands in controversy lay. Hence this clause

* Dialogus de Scaccario, p. 38

† Hist. of Exchequer, c. iii. Lord Lyttleton thinks that this institution may have been adopted in imitation of Louis VI. who half a century before had introduced a similar regulation in his dominions. Hist. of Henry II. vol. iii. p. 206.

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stood opposed on the one hand to the encroachments of the king's court, which might otherwise by drawing pleas of land to itself, have defeated the suitor's right to a jury from the vicinage; and on the other, to those of the feudal aristocracy, who hated any interference of the crown to chastise their violations of law, or controul their own jurisdiction. Accordingly, while the confederacy of barons against Henry III. was in its full power, an attempt was made to prevent the regular circuits of the judges.*

The court of Common Pleas.

Long after the separation of the exchequer from the king's court, another branch was detached for the decision of private suits. This had its beginning, in Madox's opinion, as early as the reign of Richard I.† But it was completely established by Magna Charta. "Common Pleas," it is said in the fourteenth clause, "shall not follow our court, but be held in some certain place." Thus was formed the Court of Common Bench at Westminster, with full and, strictly speaking, exclusive jurisdiction over all civil disputes, where neither the king's interest, nor any matter savouring of a criminal

* Justiciarii regis Angliæ, qui dicuntur itineris, missi Herfordiam, pro suo exequendo officio repelluntur, allegantibus his qui regi adversabantur, ipsos contrà formam provisionum Oxoniæ nuper factarum venisse. Chron. Nic. Trivet. A D 1260. I forget where I found this quotation.

† Hist. of Exchequer, c. 19. Justices of the bench are mentioned several years before Magna Charta But Madox thinks the chief justiciary of England might preside in the two courts, as well as in the exchequer After the erection of the Common Bench, the style of the superior court began to alter. It ceased by degrees to be called the king's court. Pleas were said to be held coram rege, or coram rege ubicunque fuerit And thus the court of king's bench was formed out of the remains of the ancient curia regis.

nature was concerned. For of such disputes neither the court of king's bench, nor that of exchequer, can take cognizance, except by means of a legal fiction, which, in the one case, supposes an act of force, and, in the other, a debt to the crown. CHAP. VIII. PART II. ENGLISH CONST.

Origin of the Common Law.

The principal officers of state, who had originally been effective members of the king's court, began to withdraw from it, after this separation into three courts of justice, and left their places to regular lawyers; though the treasurer and chancellor of the exchequer have still seats on the equity side of that court, a vestige of its ancient constitution. It would indeed have been difficult for men bred in camps or palaces to fulfil the ordinary functions of judicature, under such a system of law as had grown up in England. The rules of legal decision, among a rude people, are always very simple; not serving much to guide, far less to controul, the feelings of natural equity. Such were those which prevailed among the Anglo-Saxons; requiring no subtler intellect, or deeper learning, than the earl or sheriff at the head of his county-court might be expected to possess. But a great change was wrought in about a century after the conquest. Our English lawyers, prone to magnify the antiquity, like the other merits of their system, are apt to carry up the date of the common law, till, like the pedigree of an illustrious family, it loses itself in the obscurity of ancient time. Even Sir Matthew Hale does not hesitate to say, that its origin is as undiscoverable as that of Nile. But though some features of the common law may be

distinguishable in Saxon times, while our limited knowledge prevents us from assigning many of its peculiarities to any determinable period, yet the general character and most essential parts of the system were of much later growth. The laws of the Anglo-Saxon kings, Madox truly observes, are as different from those collected by Glanvil as the laws of two different nations. The pecuniary compositions for crimes, especially for homicide, which run through the Anglo-Saxon code down to the laws ascribed to Henry I.,* are not mentioned by Glanvil. Death seems to have been the regular punishment of murder, as well as robbery. Though the investigation by means of ordeal was not disused in his time,† yet trial by combat, of which we find no instance before the conquest, was evidently preferred. Under the Saxon government, suits appear to have commenced, even before the king, by verbal or written complaint; at least, no trace remains of the original writ, the foundation of our civil procedure.‡ The descent of lands before the conquest was according to the custom of gavelkind, or equal partition among the children;§ in the age of Henry I. the eldest son

* C. 70.

† A citizen of London, suspected of murder, having failed in the ordeal of cold water, was hanged by order of Henry II., though he offered 500 marks to save his life. Hoveden, p. 566. It appears as if the ordeal were permitted to persons already convicted by the verdict of a jury. If they escaped in this purgation, yet, in cases of murder, they were banished the realm. Wilkins, Leges Anglo-Saxon. p. 330. Ordeals were abolished about the beginning of Henry III.'s reign.

‡ Hickes, Dissert. Epistol. p. 8.

§ Leges Guilielmi, p. 225.

took the principal fief to his own share;* in that of Glanvil he inherited all the lands held by knight service; but the descent of socage lands depended on the particular custom of the estate. By the Saxon laws, upon the death of the son without issue, the father inherited;† by our common law, he is absolutely, and in every case, excluded. Lands were, in general, devisable by testament before the conquest; but not in the time of Henry II., except by particular custom. These are sufficient samples of the differences between our Saxon and Norman jurisprudence; but the distinct character of the two will strike more forcibly every one who peruses successively the laws published by Wilkins, and the treatise ascribed to Glanvil. The former resemble the barbaric codes of the continent, and the capitularies of Charlemagne and his family; minute to an excess in apportioning punishments, but sparing and indefinite in treating of civil rights; while the other, copious, discriminating and technical, displays the characteristics as well as unfolds the principles of English law. It is difficult to assert any thing decisively as to the period between the conquest and the reign of Henry II., which presents fewer materials for legal history than the preceding age; but the treatise denominated the Laws of Henry I., compiled at the soonest about the end of Stephen's reign,‡ bears so much of a

* Leges Henr I c 70
† Ibid
‡ The Decretum of Gratian is quoted in this treatise, which was not published in Italy till 1151

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Saxon character, that I should be inclined to ascribe our present common law to a date, so far as it is capable of any date, not much antecedent to the publication of Glanvil.* At the same time, since no kind of evidence attests any sudden and radical change in the jurisprudence of England, the question must be considered as left in great obscurity. Perhaps it might be reasonable to conjecture, that the treatise called Leges Henrici Primi contains the ancient usages still prevailing in the inferior jurisdictions, and that of Glanvil the rules established by the Norman lawyers of the king's court, which would of course acquire a general recognition and efficacy, in consequence of the institution of justices holding their assizes periodically throughout the country.

Character and defects of the English law

The capacity of deciding legal controversies was now only to be found in men, who had devoted themselves to that peculiar study; and a race of such men arose, whose eagerness and even enthusiasm in the profession of the law were stimulated by the self-complacency of intellectual dexterity in threading its intricate and thorny mazes. The Normans are noted in their own country for a shrewd and litigious temper, which may have given a character to our courts of justice in early times. Something too of that excessive subtlety, and that preference of technical to rational principles, which runs through our system, may be im-

* Madox, Hist. of Exch. p. 122. edit. 1711. Lord Lyttleton, vol. ii. p. 267. has given reasons for supposing that Glanvil was not the author of this treatise, but some clerk under his direction.

puted to the scholastic philosophy, which was in vogue during the same period, and is marked by the same features. But we have just reason to boast of the leading causes of these defects; an adherence to fixed rules, and a jealousy of judicial discretion, which have in no country, I believe, been carried to such a length. Hence precedents of adjudged cases, becoming authorities for the future, have been constantly noted, and form indeed almost the sole ground of argument in questions of mere law. But these authorities, being frequently unreasonable and inconsistent, partly from the infirmity of all human reason, partly from the imperfect manner in which a number of unwarranted and incorrect reporters have handed them down, later judges grew anxious to elude by impalpable distinctions what they did not venture to overturn. In some instances, this evasive skill has been applied to acts of the legislature. Those who are moderately conversant with the history of our law will easily trace other circumstances that have co-operated in producing that technical and subtle system, which regulates the course of real property. For as that formed almost the whole of our ancient jurisprudence, it is there that we must seek its original character. But much of the same spirit pervades every part of the law. No tribunals of a civilized people ever borrowed so little, even of illustration, from the writings of philosophers, or from the institutions of other countries. Hence law has been studied, in general, rather as an art than a science, with more solicitude to know its

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rules and distinctions, than to perceive their application to that for which all rules of law ought to have been established, the maintenance of public and private rights. Nor is there any reading more jejune and unprofitable to a philosophical mind than that of our ancient law-books. Later times have introduced other inconveniences, till the vast extent and multiplicity of our laws have become a practical evil of serious importance, and an evil which, between the timidity of the legislature on the one hand, and the selfish views of practitioners on the other, is likely to reach, in no long period, an intolerable excess. Deterred by an interested clamour against innovation from abrogating what is useless, simplifying what is complex, or determining what is doubtful, and always more inclined to stave off an immediate difficulty by some patch-work scheme of modifications and suspensions, than to consult for posterity in the comprehensive spirit of legal philosophy, we accumulate statute upon statute, and precedent upon precedent, till no industry can acquire, nor any intellect digest the mass of learning that grows upon the panting student; and our jurisprudence seems not unlikely to be simplified in the worst and least honourable manner, a tacit agreement of ignorance among its professors. Much indeed has already gone into desuetude within the last century, and is known only as an occult science by a small number of adepts. We are thus gradually approaching the crisis of a necessary reformation, when our laws, like those of Rome, must

be cast into the crucible. It would be a disgrace to the nineteenth century, if England could not find her Tribonian.*

This establishment of a legal system, which must be considered as complete at the end of Henry III.'s reign, when the unwritten usages of the common law as well as the forms and precedents of the courts were digested into the great work of Bracton, might, in some respects, conduce to the security of public freedom. For, however highly the prerogative might be strained, it was incorporated with the law, and treated with the same distinguishing and argumentative subtlety as every other part of it. Whatever things, therefore, it was asserted, that the kings might do, it was

* Whitelocke, just after the Restoration, complains that "*Now* the volume of our statutes is grown or swelled to a great bigness." The volume! What would he have said to the monstrous birth of a volume triennially, filled with laws professing to be the deliberate work of the legislature, which every subject is supposed to read, remember and understand! The excellent sense of the following sentences from the same passage may well excuse me from quoting them, and, perhaps, in this age of bigoted averseness to innovation, I have need of some apology for what I have ventured to say in the text. "I remember the opinion of a wise and learned statesman and lawyer (the Chancellor Oxenstiern) that multiplicity of written laws do but distract the judges, and render the law less certain, that where the law sets due and clear bounds betwixt the prerogative royal, and the rights of the people, and gives remedy in private causes, there needs no more laws to be increased, for thereby litigation will be increased likewise. It were a work worthy of a parliament, and cannot be done otherwise, to cause a review of all our statutes, to repeal such as they shall judge inconvenient to remain in force; to confirm those which they shall think fit to stand, and those several statutes which are confused, some repugnant to others, many touching the same matters, to be reduced into certainty, all of one subject into one statute, that perspicuity and clearness may appear in our written laws, which at this day few students or sages can find in them." Whitelocke's Commentary on Parliamentary Writ, vol. i. p. 109.

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a necessary implication, that there were other things which he could not do; else it were vain to specify the former. It is not meant to press this too far; since undoubtedly the bias of lawyers towards the prerogative was sometimes too discernible. But the sweeping maxims of absolute power, which servile judges and churchmen taught the Tudor and Stuart princes, seem to have made no progress under the Plantagenet line.

Hereditary right of the crown established.

Whatever may be thought of the effect which the study of the law had upon the rights of the subject, it conduced materially to the security of good order by ascertaining the hereditary succession of the crown. Five kings, out of seven that followed William the Conqueror, were usurpers, according at least to modern notions. Of these, Stephen alone encountered any serious opposition upon that ground; and with respect to him, it must be remembered that all the barons, himself included, had solemnly sworn to maintain the succession of Matilda. Henry II. procured a parliamentary settlement of the crown upon his eldest and second sons; a strong presumption that their hereditary right was not absolutely secure.* A mixed notion of right and choice in fact prevailed as to the succession of every European monarchy. The coronation-oath and the form of popular consent then required were considered as more material, at least to perfect a title, than we deem them at present. They gave seisin, as it were, of the

* Hallam, vol. ii. p. 14.

crown, and, in cases of disputed pretensions, had a sort of judicial efficacy. The Chronicle of Dunstaple says, concerning Richard I., that he was "elevated to the throne by hereditary right, after a solemn election by the clergy and people:"* words that indicate the current principles of that age. It is to be observed, however, that Richard took upon him the exercise of royal prerogatives, without waiting for his coronation.† The succession of John has certainly passed in modern times for an usurpation. I do not find that it was considered as such by his own contemporaries on this side of the channel. The question of inheritance between an uncle and the son of his deceased elder brother was yet unsettled, as we learn from Glanvil, even in private succession.‡ In the case of sovereignties, which were sometimes contended to require different rules from ordinary patrimonies, it was, and continued long to be, the most uncertain point in public law. John's pretensions to the crown might therefore be such as the English were justified in admitting, especially as his reversionary title seems to have been acknowledged in the reign of his brother Richard.§ If indeed we may place reliance on Matthew Paris, Archbishop Hubert, on this occasion, declared in the most explicit terms that the crown was elective, giving even to the blood royal no other preference than their merit might challenge.‖ Carte rejects this

* Lyttleton, vol. ii. p. 42. Ha reditario jure promovendus in regnum, post cleri et populi solemnem electionem.

† Gul. Neubrigensis, l. iv. c. 1.

‡ Glanvil, l. vii. c. 3.

§ Hoveden, p. 702.

‖ p. 1c.

as a fiction of the historian; and it is certainly a strain far beyond the constitution, which, both before and after the conquest, had invariably limited the throne to one royal stock, though not strictly to its nearest branch. In a charter of the first year of his reign, John calls himself king "by hereditary right, and through the consent and favour of the church and people."*

It is deserving of remark, that during the rebellions against his prince and his son Henry III., not a syllable was breathed in favour of Eleanor, Arthur's sister, who, if the present rules of succession had been established, was the undoubted heiress of his right. The barons chose rather to call in the aid of Louis, with scarcely a shade of title, though with much better means of maintaining himself. One should think that men whose fathers had been in the field for Matilda could make no difficulty about female succession. But I doubt whether, notwithstanding that precedent, the crown of England was universally acknowledged to be capable of descending to a female heir. Great averseness had been shewn by the nobility of Henry I. to his proposal of settling the kingdom on his daughter.† And from a remarkable passage which I shall produce in a note, it appears that even in the reign of Edward III. the succession was supposed to be confined to the male line.‡

At length about the middle of the thirteenth

* Jure hæreditario, et mediante tam cleri et populi consensu et favore. Gurdon on Parliaments, p. 139.

† Lyttleton, vol. i. p. 162.

‡ This is intimated by the treaty made in 1339 for a marriage between the eldest son of Edw. III.

century, the lawyers applied to the crown the same strict principles of descent which regulate a private inheritance. Edward I. was proclaimed immediately upon his father's death, though absent in Sicily. Something however of the old principle may be traced, in this proclamation, issued in his name by the guardians of the realm, where he asserts the crown of England "to have devolved upon him by hereditary succession and the will of his nobles."* These last words were omitted in the proclamation of Edward II.;† since whose time the crown has been absolutely hereditary. The coronation oath, and the recognition of the people at that solemnity, are formalities which convey no right either to the sovereign or the people, though they may testify the duties of each.

and the duke of Brabant's daughter Edward therein promises, that if his son should die before him, leaving male issue, he will procure the consent of his barons, nobles, and cities, (that is, of parliament, nobles here meaning knights, if the word has any distinct sense,) for such issue to inherit the kingdom; and if he die leaving a daughter only, Edward or his heir shall make such provision for her as belongs to the daughter of a king. Rymer, t. v. p. 114. It may be inferred from this instrument, that in Edward's intention, if not by the constitution, the Salic law was to regulate the succession of the English crown. This law, it must be remembered, he was compelled to admit in his claim on the kingdom of France, though with a certain modification which gave a pretext of title to himself.

* Ad nos regni gubernaculum successione hæreditaria, ac procerum regni voluntate, et fidelitate nobis præstitâ sit devolutum. Brady (History of England, vol. ii. Appendix, p. 1.) expounds procerum voluntate to mean willingness, not will, as much as to say, they acted readily and without command. But in all probability it was intended to save the usual form of consent.

† Rymer, t. iii. p. 1. Walsingham however asserts, that Edward II. ascended the throne non tam jure hæreditario quam unanimi assensu procerum et magnatum. p. 95. Perhaps we should omit the word non, and he might intend to say, that the king had not only his hereditary title, but the free consent of his barons.

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English gentry destitute of exclusive privileges.

I cannot conclude the present chapter without observing one most prominent and characteristic distinction between the constitution of England and that of every other country in Europe; I mean, its refusal of civil privileges to the lower nobility, or those whom we denominate the gentry. In France, in Spain, in Germany, wherever in short we look, the appellations of nobleman and gentleman have been strictly synonymous. Those entitled to bear them by descent, by tenure of land, by office or royal creation, have formed a class distinguished by privileges inherent in their blood from ordinary freemen. Marriage with noble families, or the purchase of military fiefs, or the participation of many civil offices were, more or less, interdicted to the commons of France and the empire. Of these restrictions, nothing, or next to nothing, was ever known in England. The law has never taken notice of gentlemen.* From the reign of Henry III. at least, the legal equality of all ranks below the peerage was, to every essential purpose, as complete as at present.

* It is hardly worth while, even for the sake of obviating cavils, to notice as an exception the statute of 23 H. VI. c. 14 prohibiting the election of any who were not born gentlemen for knights of the shire. Much less should I have thought of noticing, if it had not been suggested as an objection, the provision of the statute of Merton, that guardians in chivalry shall not marry their wards to villeins or burgesses, to their disparagement. Wherever the distinctions of rank and property are felt in the customs of society, such marriages will be deemed unequal; and it was to obviate the tyranny of feudal superiors, who compelled their wards to accept a mean alliance, or to forfeit its price, that this provision of the statute was made. But this does not affect the proposition I had maintained as to the *legal* equality of commoners, any more than a report of a Master in Chancery at the present day, that a proposed marriage for a ward of the court was unequal to what her station in society appeared to claim, would invalidate the same proposition.

Compare two writers nearly contemporary, Bracton with Beaumanoir, and mark how the customs of England are distinguishable in this respect. The Frenchman ranges the people under three divisions, the noble, the free, and the servile; our countryman has no generic class, but freedom and villenage.* No restraint seems ever to have lain upon marriage; nor have the children even of a peer been ever deemed to lose any privilege by his union with a commoner. The purchase of lands held by knight-service was always open to all freemen. A few privileges indeed were confined to those who had received knighthood.† But, upon the whole, there was a virtual equality of rights among all the commoners of England. What is most particular is, that the peerage itself imparts no privilege except to its actual possessor. In every other country, the descendants of nobles cannot but themselves be noble, because their nobility is the immediate consequence of their birth. But though we commonly say that the blood of a peer is ennobled, yet this expression seems hardly accurate, and fitter for heralds than lawyers; since in truth nothing confers nobility but the actual descent of a peerage. The sons of peers, as we well know, are commoners, and totally destitute of any legal right beyond a barren precedence.

There is no part, perhaps, of our constitution so admirable as this equality of civil rights; this *iso-*

* Beaumanoir, c. 45. Bracton, l. 1. c. 6.

† See for these, Selden's Titles of Honour, vol. iii. p. 486.

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nomiâ, which the philosophers of ancient Greece only hoped to find in democratical government.* From the beginning our law has been no respecter of persons. It screens not the gentleman of ancient lineage from the judgment of an ordinary jury, nor from ignominious punishment. It confers not, it never did confer, those unjust immunities from public burthens, which the superior orders arrogated to themselves upon the continent. Thus while the privileges of our peers, as hereditary legislators of a free people, are incomparably more valuable and dignified in their nature, they are far less invidious in their exercise than those of any other nobility in Europe. It is, I am firmly persuaded, to this peculiarly democratical character of the English monarchy, that we are indebted for its long permanence, its regular improvement, and its present vigour. It is a singular, a providential circumstance, that, in an age when the gradual march of civilization and commerce was so little foreseen, our ancestors, deviating from the usages of neighbouring countries, should, as if deliberately, have guarded against that expansive force, which, in bursting through obstacles improvidently opposed, has scattered havoc over Europe.

Causes of the equality

This tendency to civil equality in the English law may, I think, be ascribed to several concur-

* Ισηγορίης αρχων, πρηΰτερα μεν ανομα καλλιστον εχει, ισονομιην, says the advocate of democracy in the discussion of forms of government which Herodotus (Thalia, c. 80.) has put into the mouths of three Persian satraps, after the murder of Smerdis, a scene conceived in the spirit of Corneille

among freemen in England.

rent causes. In the first place the feudal institutions were far less military in England than upon the continent. From the time of Henry II., the escuage, or pecuniary commutation for personal service, became almost universal. The armies of our kings were composed of hired troops, great part of whom certainly were knights and gentlemen, but who, serving for pay, and not by virtue of their birth or tenure, preserved nothing of the feudal character. It was not, however, so much for the ends of national as of private warfare, that the relation of lord and vassal was contrived. The right which every baron in France possessed of redressing his own wrongs and those of his tenants by arms rendered their connexion strictly military. But we read very little of private wars in England. Notwithstanding some passages in Glanvil, which certainly appear to admit their legality, it is not easy to reconcile this with the general tenour of our laws.* They must always have been a breach of the king's peace, which our Saxon lawgivers were perpetually striving to preserve, and which the Conqueror and his sons more effectually maintained.† Nor

* I have modified this passage, in consequence of the just animadversion of a periodical critic. In the former edition, I had stated too strongly the difference, which I still believe to have existed, between the customs of England and other feudal countries, in respect of private warfare.

† The penalties imposed on breaches of the peace, in Wilkins's Anglo-Saxon laws, are too numerous to be particularly inserted. One remarkable passage in Domesday appears, by mentioning a legal custom of private feuds in an individual manor, and there only among Welshmen, to afford an inference that it was an anomaly. In the royal manor of Archenfeld in Herefordshire, if one Welshman kills another, it was a custom for

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can we trace many instances (some we perhaps may) of actual hostilities among the nobility of England after the conquest, except during such an anarchy as the reign of Stephen or the minority of Henry III. Acts of outrage and spoliation were indeed very frequent. The statute of Marlebridge, soon after the baronial wars of Henry III., speaks of the disseisins that had taken place during the late disturbances;* and thirty-five verdicts are said to have been given at one court of assize against Foulkes de Breauté, a notorious partizan, who commanded some foreign mercenaries at the beginning of the same reign:† but these are faint resemblances of that wide-spreading devastation which the nobles of France and Germany were entitled to carry among their neighbours. The most prominent instance perhaps of what may be deemed a private war arose out of a contention between the earls of Glocester and Hereford, in the reign of Edward I., during which acts of extraordinary violence were perpetrated; but, far from its having passed for lawful, these powerful nobles were both committed to prison, and paid heavy fines.‡ Thus the tenure of knight-service was not in effect much more peculiarly connected with the profession of arms than that of socage. There was nothing in the

the relations of the slain to assemble and plunder the murderer and his kindred, and burn their houses until the corpse should be interred, which was to take place by noon on the morrow of his death Of this plunder the king had a third part, and the rest they kept for themselves p 170

* Stat 52 H III

† Matt. Paris, p 271

‡ Rot Parl vol i p 70

former condition to generate that high self-estimation, which military habits inspire. On the contrary, the burthensome incidents of tenure in chivalry rendered socage the more advantageous, though less honourable of the two.

In the next place, we must ascribe a good deal of efficacy to the old Saxon principles, that survived the conquest of William, and infused themselves into our common law. A respectable class of free socagers, having, in general, full rights of alienating their lands, and holding them probably at a small certain rent from the lord of the manor, frequently occur in Domesday Book. Though, as I have already observed, these were derived from the superior and more fortunate Anglo-Saxon ceorls, they were perfectly exempt from all marks of villenage both as to their persons and estates. Some have derived their name from the Saxon *soc*, which signifies a franchise, especially one of jurisdiction. And whatever may come of this etymology, which is not perhaps so well established as that from the French word *soc*, a ploughshare,* they undoubtedly were suitors to

* It is not easy to decide between these two derivations of the words socage and socman. On the one hand, the frequent recurrence in Domesday Book of the expression, socmanni de soca Algari, &c seems to lead us to infer that these words, so near in sound were related to each other Somner (on Gavelkind, p. 13) is clearly for this derivation But Bracton, l. ii. c 35, derives socage from the French soc, and this etymology is curiously illustrated by a passage in Blomefield's Hist of Norfolk, vol iii. p 538. (folio) In the manor of Cawston, a mace with a brazen hand holding a ploughshare was carried before the steward, as a sign that it was held by socage of the duchy of Lancaster Perhaps, however, this custom may be thought not sufficiently ancient to confirm Bracton's derivation

CHAP. VIII. PART II. ENGLISH CONST.

the court-baron of the lord, to whose soc, or right of justice, they belonged. They were consequently judges in civil causes, determined before the manerial tribunal.* Such privileges set them

* Territorial jurisdiction, the commencement of which we have seen before the conquest, was never so extensive as in governments of a more aristocratical character, either in criminal or civil cases. 1. In the laws ascribed to Henry I. it is said that all great offences could only be tried in the king's court, or by his commission c 10. Glanvil distinguishes the criminal pleas, which could only be determined before the king's judges, from those which belong to the sheriff. Treason, murder, robbery, and rape were of the former class; theft of the latter. l. xiv. The criminal jurisdiction of the sheriff is entirely taken away by Magna Charta. c. 17. Sir E. Coke says, the territorial franchises of infangthef and outfangthef "had some continuance afterwards, but either by this act, or per desuetudinem, for inconvenience, these franchises within manors are antiquated and gone." 2 Inst. p. 31. The statute hardly seems to reach them; and they were certainly both claimed and exercised, as late as the reign of Edward I Blomefield mentions two instances, both in 1285, where executions for felony took place by the sentence of a court-baron. In these cases the lord's privilege was called in question at the assizes, by which means we learn the transaction, it is very probable, that similar executions occurred in manors, where the jurisdiction was not disputed (Hist of Norfolk, vol i p 313.; vol iii. p. 50.) Felonies are now cognizable in the greater part of boroughs; though it is usual, except in the most considerable places, to remit such as are not within benefit of clergy, to the justices of gaol delivery on their circuit. This jurisdiction, however, is given, or presumed to be given, by special charter, and perfectly distinct from that which was feudal and territorial. Of the latter some vestiges appear to remain in particular liberties, as for example the Soke of Peterborough, but most, if not all, of these local franchises have fallen, by right or custom, into the hands of justices of the peace A territorial privilege somewhat analogous to criminal jurisdiction, but considerably more oppressive, was that of private gaols. At the parliament of Merton, 1237, the lords requested to have their own prison for trespasses upon their parks and ponds, which the king refused. Stat. Merton, c 11. But several lords enjoyed this as a particular franchise; which is saved by the statute 5 H. IV c 10. directing justices of the peace to imprison no man, except in the common gaol. 2. The civil jurisdiction of the court-baron was rendered insignificant not only by its limitation, in personal suits, to debts or damages not exceeding forty shillings, but by the writs of *tolt* and *pone*, which at once removed a suit for lands, in any stage of its progress before judgment, into the county court or that of the king. The statute of Marlebridge took away all appellant jurisdiction of

greatly above the roturiers, or censiers of France. They were all Englishmen, and their tenure strictly English; which seems to have given it credit in the eyes of our lawyers, when the name of Englishman was affected even by those of Norman descent, and the laws of Edward the Confessor became the universal demand. Certainly Glanvil, and still more Bracton, treat the tenure in free socage with great respect. And we have reason to think, that this class of freeholders was very numerous even before the reign of Edward I.

But, lastly, the change which took place in the constitution of parliament consummated the degradation, if we must use the word, of the lower nobility: I mean, not so much their attendance by representation instead of personal summons, as their election by the whole body of freeholders, and their separation, along with citizens and burgesses, from the house of peers. These changes will fall under consideration in the following chapter.

the superior lord, for false judgement in the manerial court of his tenant, and thus aimed another blow at the feudal connexion. 52 H III c 19. 3 The lords of the counties palatine of Chester and Durham, and the Royal franchise of Ely had not only a capital jurisdiction in criminal cases, but an exclusive cognizance of civil suits; the former still is retained by the bishops of Durham and Ely, though much shorn of its ancient extent by an act of Henry VIII (27 H. VIII c 24) and administered by the king's justices of assize, the bishops or their deputies being put only on the footing of ordinary justices of the peace Id. s 20.

END OF THE SECOND VOLUME.

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